FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN, *Appellants,*

vs.

STATE OF MISSISSIPPI, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

and

No. 77-836

UNITED STATES OF AMERICA, *Petitioner,*

vs.

SMITH JOHN and HARRY SMITH JOHN, *Respondents.*

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF MISSISSIPPI

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Consolidation of these cases recognizes the same basic question involved in both: the legal position and status of the Choctaws of Mississippi. Briefs filed herein by Appellants-Respondents, Smith John and Harry Smith John, and Petitioner, United States of America, acknowledge a viewpoint on the question contrary to that of the State of Mississippi (Mississippi). Therefore, of necessity and in the interest of consolidating and focusing argumentation, this brief will reply to positions advanced by both Appellants-Respondents (John) and Petitioner (Government).

JURISDICTION

On January 16, 1975, this Court postponed the question of jurisdiction in No. 77-575 which appellant claims to lie pursuant to 28 U.S.C. §1257(1) and/or 28 U.S.C. §1257(2). Therefore, appellee has briefed its position opposing such claim under Argument.

Jurisdiction is invoked over No. 77-836 under 28 U.S.C. §1254(1).[1]

STATEMENT OF THE CASES

A. The Federal Courts Below

Mississippi residents of Choctaw Indian blood (John) were indicted by a federal grand jury in October, 1975; tried before the United States District Court for the Southern District of Mississippi December 8-9, 1975; and were convicted of simple assault. They appealed to the United States Fifth Circuit Court of Appeals.

In July, 1976, the Fifth Circuit requested the Department of Justice to brief the issue of whether the district court had jurisdiction, pursuant to 18 U.S.C. 1153, to try the case and, in particular, whether the alleged offense occurred in Indian country within the meaning of that statute. (The parties, John and the Government, had stipulated that the alleged crime occurred on land within Indian country.)

On October 11, 1977, the Fifth Circuit stated:

> We hold that the lands in the various tracts of the Mississippi Choctaw Indian "Reservation" are not within "Indian Country", as contemplated by 18 U.S.C. §§1151, 1153. We further hold that to date the inherent police power of the State of Mississippi over its emancipated Indian citizens of Choctaw blood stands unimpaired. This, however, has nothing to do with the legality of the congressional policy of benevolence toward the Mississippi Choctaws as begun in 1918 and since pursued.
>
> The District Court was without subject matter jurisdiction of these prosecutions.

The convictions were reversed and the case remanded to the District Court with instructions to set them aside and dismiss the indictment. The Fifth Circuit opinion is now before this Court on review and is attached as Appendix to the Motion to Dismiss.

B. The Mississippi Courts Below.

In April, 1976, John was indicted by the Leake County, Mississippi, Grand Jury on the charge of aggravated assault. The motion to dismiss was denied and after trial before a jury on May 7, 1976, John was convicted and sentenced to the Mississippi State Penitentiary. (This sentence has not been served since John has remained free on bond.)

Upon appeal, the Mississippi Supreme Court affirmed the conviction. Under date of May 11, 1977, it issued an opinion quoting extensively from the Fifth Circuit Court of Appeals in *United States* v. *State Tax Commission*, 505 F.2d 633 (5th Cir. 1974), *rehearing denied*, 535 F.2d 300 (1976), *rehearing en banc denied*, 541 F.2d 469 (1976)[2]

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1. In addition to cases cited herein, Mississippi continues to rely on cases cited in the Motion To Dismiss filed in No. 77-575.

2. These opinions are reprinted in the Appendix to this brief because of their detailed consideration of issues now before the Court in these consolidated cases.

and stating that its "holding is persuasive on the issues involved in this case." In particular, the Mississippi Supreme Court noted the Fifth Circuit's opinion that after the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), the Choctaws who remained in Mississippi were no longer an Indian Tribe but were emancipated citizens of Mississippi, not wards of the United States, and did not live in Indian country. The Supreme Court of Mississippi stated, in part:

> The fallacy of defendants' argument is that the United States District Court had no jurisdiction to try them under Major Crimes Act, 18 U.S.C.A. §1153. There is no Indian country in Mississippi, the defendants are citizens of Mississippi subject to its laws, and therefore are subject to prosecution in its courts. . . .

Thus the May 11, 1977 opinion of the Mississippi Supreme Court is in essential agreement with the October 11, 1977 opinion (and previous opinions) of the United States Fifth Circuit Court of Appeals and both are before this Court under consolidation. A copy of the opinion below is before this Court as Appendix to the Jurisdictional Statement.

SUMMARY OF ARGUMENT

Acts of Congress and Mississippi statutes were not so drawn in question in No. 77-575 as to meet the requisites for appeal under 28 U.S.C. §1257(2) or §1257(1).

The fundamental question of jurisdiction, federal or state, over Mississippi citizens of Choctaw Indian blood is before the Court in these consolidated cases. The position of Mississippi is that the Choctaw *tribe* removed from Mississippi in the early 1830's in accordance with a treaty

between the tribe and the United States. By the terms of this treaty, individual Choctaws were permitted to remain in Mississippi as citizens. Those who remained were emancipated from federal control, have remained so emancipated to the present, and, absent Congressional enactments to the contrary, will remain so emancipated. These persons are, therefore, subject to the jurisdiction of the State of Mississippi as are its other citizens, and there is no valid, lawful or proper reason for them to be subject to exclusive federal jurisdiction.

More specifically, the tribal character of Choctaw Indians in Mississippi ended when the United States Senate ratified the Treaty of Dancing Rabbit Creek in 1831. Mississippi Choctaws who elected to remain in the state rather than remove to western Indian territory became citizens of the state, and they and their descendants were largely ignored by the federal government for some ninety years following the treaty. Mississippi Choctaw citizens did not become a tribe, did not live on a reservation in Indian country, and did not become wards of the federal government as a result of the Indian Reorganization Act (1934) and a proclamation of the Department of Interior (1944).

Consequently, provisions of the United States Code dealing with Indian reservations, Indian country, and Indian crimes are inapplicable to Mississippi Choctaws. Therefore, state rather than federal jurisdiction should obtain in these consolidated cases.

A brief review of the history of the Choctaws supports this argument.

The aboriginal Choctaws of Mississippi, Alabama, and Louisiana lived in close proximity to and in harmonious relations with the French colonials (from 1699), the Spanish (1781), and the Americans (after 1798). Neither the Act of March 1, 1817 (3 Stat. 348) enabling the people

of the Mississippi Territory to prepare for statehood nor the resolution of December 10, 1817 (3 Stat. 472) admitting Mississippi as the 20th state in the Union made any mention of the Choctaw residents.

Migration into the territory and the new state brought pressure for a removal of the native Indians to unsettled territory in the west. National policy at the time supported such removal. Treaties were made between the United States and the Choctaw Tribe in 1786 (7 Stat. 21), 1801 (7 Stat. 66), 1802 (7 Stat. 73), 1803 (7 Stat. 80), 1805 (7 Stat. 98), 1816 (7 Stat. 152), 1820 (7 Stat. 210) and 1825 (7 Stat. 234). In 1829 the Mississippi Legislature extended legal process into that portion of the state occupied by the Choctaws and, in 1830, abolished the government of the Choctaws, granted them full citizenship and extended the laws of the state over them. Later that year, the United States and the Choctaw Nation entered into the Treaty of Dancing Rabbit Creek (7 Stat. 333) providing for the final removal of the tribe to the west. This treaty was ratified by the United States Senate February 24, 1831.

The language of the treaty recognized the fact that Mississippi had extended its laws over the Choctaws. Article XIV provided for Choctaws who so wished to remain in the state as citizens. The majority of the Choctaws removed to the western territory, and the tribal character of Choctaw Indians in Mississippi ended.

The Choctaws who remained in Mississippi were not wards of the federal government or wards of any government. They were individual citizens. Some prospered (Greenwood Leflore, a former Choctaw Chief, became a Mississippi State Senator; the city of Greenwood and the County of Leflore are named for him); others did not.

They lived in many different parts of the state and in neighboring states.

In the late 1800's, Congress undertook a program designed to terminate the existing tribal governments in the Indian Territory. At this time Mississippi Choctaws were permitted to rejoin the Choctaw Tribe in the west and some did so. With the passage of the Act of April 26, 1906, providing for the final winding up of tribal affairs and the admission of Oklahoma as a state in 1907, the Choctaw Tribe effectively passed out of existence as a separate political entity.[3]

During the period 1908-1918, Members of Congress from Mississippi made repeated attempts to have Congress reopen the Choctaw rolls in Oklahoma so that Mississippi Choctaws could join their people in the west; these efforts failed.

In 1918 conditions among certain Mississippi Choctaws prompted Congress to provide through an appropriation bill for "the relief of [their] distress". This gratuity did not recognize the Choctaws as a tribe, made no mention of any Indian reservation and did not state that the Mississippi Choctaws were wards of the government. The act contained repayment provisions.

From 1918 to 1931 other funds were appropriated for the purchase of lands to be sold to individual Mississippi Choctaws. Various tracts, totaling some 3,680 acres, were purchased during this period and sold on a reimbursable basis; all purchasers defaulted in payment.

In 1934 two opposing factions of Choctaw Indians in Mississippi organized: the Mississippi Choctaw Indian

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3. *Choctaw Nation* v. *United States*, 397 U.S. 620 (1970); *Choctaw Nation* v. *United States*, 119 U.S. 1 (1886); *Choctaw Nation* v. *United States*, 81 Ct. Cl. 1 (1935).

Federation and the Choctaw Business Committee. The latter was recognized and approved by Indian Bureau representatives in the area and, under federal tutelage, this group voted, in March, 1935, to "accept the provisions" of the Indian Reorganization Act of June 18, 1934.

In 1936 confusion over the status of the lands purchased for the Mississippi Choctaws prompted a Memorandum Opinion from the Solicitor of the Department of Interior. He stated, among other things, ". . . there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe. The Choctaw tribe or nation of Indians, formerly of Mississippi, removed to Oklahoma and became one of the Five Civilized Tribes."

In 1939, Congress acted "To define the status of certain lands purchased for the Choctaw Indians" in Mississippi and title to the lands was "declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." 53 Stat. 851 (1939).

In 1944, relying on the land purchases, the Indian Reorganization Act, and the land status act of 1939, an Assistant Secretary of the Interior issued a proclamation purporting to recognize the "tribal" organization of the Mississippi Band of Choctaw Indians and declaring the lands purchased to be an Indian reservation.

(A 1974 survey indicates that Choctaws presently live in most of Mississippi's counties and in Western Tennessee and states that "Seven geographically-distinct communities, spanning seven counties in east central Mississippi, comprise the Choctaw reservation area".)

In 1975, Appellants-Respondents (John) were charged with a federal crime alleged to have taken place "in Leake

County, Mississippi, in the NE 1/4 of Section 35, Township 11 N Range 7 E, . . . on and within the Choctaw Indian Reservation and on land within the jurisdiction of the United States of America . . . in violation of Sections 1153 and 113(a), Title 18, United States Code."

Mississippi contends that the lands described in the indictment are not in Indian country and that, therefore, 18 U.S.C. §1153 did not and could not confer subject matter jurisdiction on the federal court.

This contention is based on assertions that: (1) there has been no lawfully constituted Indian *tribe* in Mississippi since 1830-31; (2) Mississippi Choctaws have been citizens of the state and not wards of the federal government since the Treaty of Dancing Rabbit Creek; (3) Congress has not recognized Mississippi Choctaws as a tribe since 1830-31 and that this posture has been deliberate; (4) appropriations for relief measures and land purchases have not created a tribe, established a reservation, or removed the emancipated status of Mississippi Choctaws; (5) the plain language of the Indian Reorganization Act indicates that it has no applicability to Mississippi Choctaws; (6) the Act of June 21, 1939 merely clarified and defined the status of certain lands purchased in Mississippi and was not operative to create a tribe, a reservation, or a wardship relation; (7) that the 1944 proclamation of the Department of the Interior (relying on and grounded in the land purchases and Indian Reorganization Act) is of no binding force regarding Mississippi's jurisdiction over its citizens; and that (8) provisions of the United States Code dealing with Indian country and crimes thereon are inapplicable to the present case.

ARGUMENT

A. Jurisdiction Does Not Lie Over No. 77-575 As an Appeal.

Pursuant to this Court's order postponing the question of jurisdiction in No. 77-575 to the hearing of the case on the merits, 46 U.S.L.W. 3453, appellee submits and will show that jurisdiction does not lie under 28 U.S.C. §1257(2) or under 28 U.S.C. §1257(1).

In regard to 28 U.S.C. §1257(2), appellant contends that the validity of Miss. Code Ann. §97-3-7(2) (Supp. 1977), as applied to him, was drawn in question. To this contention he now for the first time adds and challenges all "general state laws conferring jurisdiction on the trial court, authorizing arrests, authorizing indictments, etc." Appellee submits the Motion to Dismiss was insufficient to draw in question the state laws for jurisdiction as appeal.

An assertion that appellant's federal rights make him immune from state prosecution is insufficient to draw in question the validity of the state statute, *Rust Land & L. Co.* v. *Jackson*, 250 U.S. 71 (1918), and a challenge to the court's power to proceed to a decision on the merits does not draw in question authority exercised under a state statute. *Philadelphia and R. C. and I. Co.* v. *Gilbert*, 245 U.S. 162 (1917). The validity of Miss. Code Ann. §97-3-7(2) (Supp. 1977) has not been drawn in question. The issue involved and argued here is whether this defendant, a Choctaw citizen of Mississippi, can be prosecuted in state court for the crime of aggravated assault (Miss. Code Ann. §97-3-7(2) (Supp. 1977)), or whether, because the crime was committed on federal trust property, he

must be prosecuted in federal court. (18 U.S.C. §§1153, 113(a)). The court below held Mississippi has no Indian Country, and criminal jurisdiction is with the state. That decision in regard to jurisdiction was not grounded on the state statute, but rather on the view of the property involved. The statute was too tangentially involved to satisfy 28 U.S.C. §1257(2). *Vale* v. *Louisiana*, 399 U.S. 30 (1970); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Dana* v. *Dana*, 250 U.S. 220 (1918).

Appellee also denies that jurisdiction lies under 28 U.S.C. §1257(1). To appellant's original contention that the court below held invalid two Acts of Congress, he now adds three other Acts of Congress, and appellee responds that the five cited federal statutes were not held unconstitutional as applied. The court below did not deny the power of Congress to pass such statutes. *Miller* v. *Cornwall R. Co.*, 168 U.S. 131 (1897); *Baltimore and Potomac R. Co.* v. *Hopkins*, 130 U.S. 210 (1889). The validity of a federal statute is not drawn in question every time rights claimed under the statute are contested. *Kennard* v. *Nebraska*, 186 U.S. 304 (1902); *County of Cook* v. *Calumet and Chicago Canal and Dock Co.*, 135 U.S. 635 (1890). At issue in this case is the scope of the cited federal statutes as they pertain to the Choctaw Indians living in Mississippi. Those statutory purposes were construed by the court below, and as appellee will argue, such Indians were properly found outside their scope. Jurisdiction under 28 U.S.C. §1257(1) does not lie where the State decision turned on a construction of the statute or a finding that a set of facts do not bring federal statutes into operation. *Ivanhoe Irrig. Dist.* v. *McCrackin*, 357 U.S. 275 (1958); *Crary* v. *Devlin*, 154 U.S. 619 (1876). Certainly, the Act of June 21, 1939, 53 Stat. 851, not mentioned in the opinion below, was not held invalid. As will be

shown by historical review of these Indians, this Act was only to clarify the status of land previously purchased by the United States government; it did not have the purpose which appellant argues that it did. The opinion below quotes from *United States* v. *State Tax Commission*, 535 F.2d 300 (5th Cir. 1976), as follows [535 F.2d at 306]:

> (4) Nothing in the various Congressional enactments indicates a desire or purpose to abrogate the Dancing Rabbit Treaty;
>
> (5) Nothing in the various Congressional enactments indicates a desire or purpose to oust Mississippi of its jurisdiction over those who had been its citizens, so declared by the Treaty, for over a hundred years.

B. Preliminary Statement.

John's brief, at page 15, states: "Federal supervision over the Mississippi Choctaws was reestablished in stages between 1918-1945." The Government's brief likewise refers to "power to reassert federal dominion over Indians previously released from the guardian-ward relationship." It is the intent of this argument in reply to illustrate the invalidity of this reestablishment of federal supervision over certain Mississippians and the consequential error of John (and the Government) with respect to the attendant question of jurisdiction.

I. Federal Indian Law Is Dependent on Tribal Considerations.

Indian tribes are unique aggregations and must be viewed as such both historically and legally. The Constitution mandates that federal Indian law be *tribal* and not *racial* in concept and execution.

Nathan R. Margold, Solicitor, Department of the Interior, in his July 3, 1940, introduction to Felix S. Cohen's Handbook of Federal Indian Law, pointed out that ". . . the existence of federal Indian law can be neither justified nor understood except in terms of the existence of Indian tribes." He also wrote: "Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored." Both statements are relevant to these consolidated cases.

Article I, §8, cl. 3, of the United States Constitution provides Congress with power to "regulate Commerce . . . with the Indian Tribes." This, together with provisions of the fifth, fourteenth, and fifteenth amendments, caused Margold to comment: ". . . a body of federal Indian law, considered as 'racial law,' would be as much an anomaly as a body of federal law for persons of Teutonic descent. . ."

Two recent cases affirm the necessity of tribal considerations: *United States* v. *Antelope*, 430 U.S. 641 (1977) and *Morton* v. *Mancari*, 417 U.S. 535 (1974). In the former it was said 430 U.S. at 645):

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

If federal Indian law is grounded in tribal considerations, it follows that there must be a tribe in existence to be the subject or object of such consideration. And the tribe must be a lawful or valid tribe. As stated in *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913):

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the Courts.

By the terms of the Treaty of Dancing Rabbit Creek, the Choctaw Tribe, as a *tribe*, ceded to the United States the entire area possessed by the tribe in Mississippi and agreed to remove to western territory beyond the Mississippi River. Treaty of September 27, 1830 (7 Stat. 333); *Winton* v. *Amos*, 255 U.S. 373 (1920). This treaty was ratified by the United States Senate in February, 1831. Since that date there has not been a lawful or valid tribe of Indians in the State of Mississippi. Congress ratified the Treaty of Dancing Rabbit Creek and, since the date of that ratification, has not acted to create or reestablish a tribe, reservation or wardship relation with the Choctaws of Mississippi.

II. The Treaty of Dancing Rabbit Creek Ended the Tribal Character of Mississippi Choctaws.

Article VI, cl. 2, of the United States Constitution states that ". . . Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land. . ." Prior to the Indian Appropriation Act of March 3, 1871, 16 Stat. 544, 566, treaties were recognized and accepted as a method of agreement between the United States and the various Indian tribes. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Peters) 1 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Peters) 515 (1832).

The Act of March 3, 1871, 16 Stat. 544, 566, terminating the treaty-making practice, recognized the validity and obligations of early treaties; it stated:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

The Treaty of Dancing Rabbit Creek, ratified some forty years prior to the Act of March 3, 1871, is fundamental to the consolidated cases before the Court; a closer look at its history and provisions is warranted.

The Choctaw Tribe originally occupied land in what became the State of Mississippi (and portions of Alabama and Louisiana).[4] After the United States took over this area, national policy and local demands required a series of treaties with the tribe. Accordingly treaties were made: January 3, 1786, 7 Stat. 21, at Hopewell, in northwestern South Carolina, defining the boundaries of the Choctaw Nation North of the 31° of North Latitude, East of the Natchez District; December 7, 1801, 7 Stat. 66, at Fort Adams, permitting the conversion of the Natchez Trace into a federal road and ceding 2,245,720 acres; October 17, 1802, 7 Stat. 73, at Fort Confederation on the Tombigbee, marking the boundary from the Chickasawhay to the Tombigbee; August 31, 1803, 7 Stat. 80, at Ho-buckin-too-pa, ceding 1,000,000 acres; November 6, 1805, 7 Stat. 98, at

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4. Contrary to the Government's brief at page 5, it has not been shown that the land ceded in 1830 by the Choctaws is the same land now held in trust.

Mt. Dexter, ceding 4,374,244 acres; October 24, 1816, 7 Stat. 152, at St. Stephens, ceding land where Columbus, Mississippi, now stands; October 18, 1820, 7 Stat. 210, at Doak's Stand On the Natchez Trace (negotiated by General Andrew Jackson and Chief Pushmataha), exchanging 5,000,000 acres in Mississippi for lands between the Arkansas, the Red, and the Canadian Rivers; and January 20, 1825, 7 Stat. 234, at Washington, agreeing that all Indians living on the exchanged lands in Mississippi might remain if desired and receive acreage.

The Treaty of Dancing Rabbit Creek, 7 Stat. 333, ceded the last of the Choctaw Tribal lands in Mississippi, some 10,500,000 acres, and provided for the removal of the tribe to western territory.

[Unlike the later practice of addressing Indian resident questions in enabling acts permitting the admission of new states, neither the Act of March 1, 1817, 3 Stat. 348, enabling the people of the Mississippi Territory to prepare for statehood nor the resolution of December 10, 1817, 3 Stat. 472, admitting Mississippi as a state of the Union made mention of the Choctaws.]

The Treaty of Dancing Rabbit Creek followed both national and state policy and practice. In 1829 Mississippi extended legal process into that portion of the state occupied by the Choctaws (Act of February 4, 1829; Hutch. Code, Art. 13 at 135 (1848)) and by Act of January 19, 1830 (Hutch. Code, Art. 14 at 136 (1848)) abolished the government of the Choctaws, granted them full citizenship, extended the laws of the state over them, and abolished their office of Chief. Congress, by Act of May 28, 1830, 4 Stat. 411, the Indian Removal Bill, had expressed the settled purpose of the national government to locate the eastern Indian tribes on lands beyond the Mississippi.

The opening language of the treaty is of interest:

> Whereas the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws; Now therefore that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi and have accordingly agreed to the following articles of treaty:

Recognizing the fact that many Choctaws preferred to remain in Mississippi, Article XIV of the Treaty provided:

> Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land. . . If they reside upon said lands intending to become citizens of the States for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; . . . Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.[5]

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5. Am. State Papers, VII, Public Lands, 133 (1860) and VIII, Public Lands, 687 (1861) contain registers of Choctaws who expressed intention to become citizens of Mississippi and detailed letters by governmental personnel and others regarding these Choctaws.

In 1831, 1832, and 1833, the majority of the tribe moved west; some one-third (approximately 5,000) had initially elected to remain in Mississippi. Migration continued over the years and approximately 2,000 Choctaws remained in Mississippi in 1900.[6]

Appellants-Respondents John are presumably descendants of Choctaws who elected to remain in Mississippi. In any event, they are Mississippi Choctaws who must trace their connection to their ancestral tribe through the provisions of the Treaty of Dancing Rabbit Creek, a treaty ratified over a century ago and unmodified or changed since its ratification with respect to Mississippi Choctaws.

It has been held that Congress may supersede treaties with Indian *tribes*. *The Cherokee Tobacco,* 78 U.S. (11 Wall.) 616, 621 (1870); *Ward* v. *Race Horse,* 163 U.S. 504, 511 (1896); *Draper* v. *United States,* 164 U.S. 240, 243 (1896); *Thomas* v. *Gay,* 169 U.S. 264, 271 (1898); *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903); and *Ex Parte Webb,* 225 U.S. 663 (1912). But, to reiterate, *Congress has not chosen to do so with regard to* the Treaty of Dancing Rabbit Creek.

Commenting on this exact point in *United States* v. *State Tax Commission,* 541 F.2d 469 (5th Cir. 1976), the Court said (541 F.2d at 470-471):

> When Congress, in 1871, reaffirmed the validity of all prior Indian treaties, the Treaty of Dancing Rabbit had been on the books for forty years, and for nearly that long the Choctaw Indian Tribe had been removed to the Indian Territory. Those of Choctaw blood who chose to remain in Mississippi as citizens

6. Gibson, *The Indians of Mississippi,* in I A History of Mississippi 69 (R. A. McLemore ed. 1973); J. Claiborne, Mississippi As A Province, Territory and State (2d ed. 1964).

had for that long been emancipated from the control and protection of the United States, subject to all the obligations of state citizenship. As noted in our prior opinions in this case, the United States government took no notice of the Mississippi Choctaws until 1918, when, as a "gratuity", it extended financial relief, most of which was to have been repaid.

Leaving aside the factor of intervening state sovereignty over its citizens in matters left to the states under our federal system, the lengthy list of cases cited *supra* make it clear that the Dancing Rabbit Treaty may not be superseded by implication—see, particularly, *Ward* v. *Race Horse,* 163 U.S. at 511, 16 S.Ct. 1076.

The dispositive point is that throughout a period of 145 years the Congress has never passed an act specifying a purpose to supersede the Treaty of Dancing Rabbit or declaring that the State of Mississippi shall be deprived of the jurisdiction appropriately belonging to it. To the contrary, as pointed out in our previous opinions, especially in the legislative history appearing at 535 F.2d 306, Congress has repeatedly declined earnest solicitations that it take such action with reference to the Mississippi Choctaws.

The Treaty of Dancing Rabbit Creek ended the tribal character of Mississippi Choctaws and Congress has not superseded the provisions of that treaty, has enacted no legislation creating a tribe in Mississippi, establishing a reservation or purporting to reestablish a wardship relation between the United States and Mississippi's Choctaw citizens. As enunciated in *McCurdy* v. *United States,* 246 U.S. 263, 38 S.Ct. 289, 62 L.Ed. 706 (1918) [citing *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803): Governmental authority cannot rest upon a foundation built entirely of

sand; there must be some legislative cement therein. Congress has failed to provide the "legislative cement" necessary to hold together the arguments of the Department of Interior, the Government, and John with regard to the Mississippi Choctaws.

III. Mississippi Choctaws: Not a Tribe; Not Living on a Reservation; Not Wards of the United States Government.

A. Circa 1830.

At the time of the Treaty of Dancing Rabbit Creek, Mississippi Choctaw Indians were not untutored savages living in a state of warfare with their white neighbors. Indeed, for approximately 130 years they had lived in peace and harmony with the French, Spanish, English and Americans who settled in the area. (Pushmataha, a Choctaw chief, was made a lieutenant colonel in the army in 1813 after he had refused to join the Creek conspiracy; when he went to Washington in connection with the Treaty of Doak's Stand, he was honored by President Monroe.) By 1830, many Choctaws were people of property and means, as ready for civilization as the rough-hewn emigrants walking into the new state from the hills and mountains to the east.[7]

Consequently, many Choctaws elected to remain in Mississippi as citizens when the tribe removed to western Indian territory in accordance with the terms of the Treaty of Dancing Rabbit Creek. Certain articles of the Treaty provided specific allotments of land to certain individuals (e.g. Articles XV and XIX) and Article XIV provided for any other "Choctaw head of a family" to remain and become a citizen. Those who remained were fully eman-

7. J. Betterworth, Mississippi: a history (1959)

cipated from federal control. When tribal existence ceases, Indians cease to be under federal jurisdiction and become subject to state law. *Worcester* v. *Georgia*, 31 U.S. (6 Peters) 515, 580 (1832); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 146 (1810).

B. 1830-1918.

In the years immediately following the Treaty of Dancing Rabbit Creek (1831-33), the federal government was interested primarily in the removal of the Choctaws to the western territory and with Choctaws claiming land allotments. The Mississippi Choctaws were then left to their own devices.

Greenwood Leflore, although admittedly atypical, is noteworthy as one of the Choctaws who remained in Mississippi. As noted in C. Rand, Men of Spine in Mississippi 129-130 (1914):

> Showing a keen capacity of leadership and a deep sympathy for his mother's people, he was chosen chief of the Choctaw Nation at the age of twenty-six and at thirty, by popular vote, was elected head chieftain of the tribe.
>
> * * *
>
> He cast his lot with the white man's economic system, and from a log cabin, with a federal grant of four sections of land and a small annuity, he arose to a position of great wealth and power.
>
> He grew cotton, accumulated land and money until his plantation in the fertile valley of the Mississippi alone comprised 15,000 acres. He owned slaves and built a plantation palace, Malmaison, the Louis XIV furniture for one room costing $10,000.00. Here he entertained with all the traditional hospitality of the

Old South. In addition to his Mississippi holdings, he held part interest in 60,000 acres in Texas.

Dissatisfied with the way his cotton was handled on the Yazoo River, he established a town of his own, Point LeFlore, and constructed a $75,000.00 turnpike to attract business to his trading center. He ran a store, built a sawmill and operated a steamboat.

He served in the state senate from 1841 to 1844 and became a political as well as financial factor in Mississippi.

But with the exception of the relatively short antebellum period (1830-1860), Mississippi and all of its citizens (whether of European, Indian or African ancestry) suffered through war, reconstruction and depression. From a position as a relatively rich state, Mississippi became one of the poorest states in the Union. From time to time, the Mississippi Choctaws rejoined their brethern in the west and became thereby citizens of the Choctaw Nation.[8]

The authority on Choctaw history, Angie Debo, *supra*, n. 8, p. 181 has written:

> Although the Choctaws were not willing to grant citizenship to all persons who could claim remote descent from a Choctaw ancestor, they welcomed the immigration of such of their own people as had remained in Mississippi. . . . the [Choctaw] Council memorialized Congress to appropriate money for their removal. Although Congress failed to act, a large number were persuaded to come during 1890. Numerous acts of the Council granted citizenship to these new arrivals, often designated as fullbloods, and money was frequently appropriated to support them until

8. A. Debo, The Rise and Fall of the Choctaw Republic 180 (2d ed. 1961)

> they should be able to raise a crop. In 1891 the Council appropriated $1,792.50 to pay the expenses of removal and provided for the appointment of two commissioners to go to Mississippi "to collect up the Choctaws and bring them to this Nation." . . . As late as 1895 frequent grants of citizenship and money were made to fresh recruits from Mississippi and Louisiana.

By Act of March 3, 1893, 27 Stat. 612, 645, Congress began a policy of terminating the tribal existence of the Five Civilized Tribes (the Choctaws, Cherokees, Chickasaws, Creek and Seminoles) in western Indian Territory. The Dawes Commission, appointed under the provisions of the Act of March 3, 1893, was given the work of closing out the tribal estate and terminating the tribal government. The Act of June 10, 1896, 29 Stat. 321, 339-340, directed the Commission to prepare rolls of the tribes. As described by Debo, *supra*, n. 8, at 273-4:

> During the enrollment period many applications were presented by people claiming to have Choctaw blood, who had lived outside the Nation and had never been recognized as citizens. The Dawes Commission uniformly decided against these claimants, and Judge Clayton also ruled that since the object of the removal treaties had been to limit the Choctaws to a certain area, and since the title to their lands was to exist only so long as they should live there, Choctaw blood did not of itself confer citizenship. . . .
>
> An exception was made in the case of the Mississippi Choctaws, since the Treaty of Dancing Rabbit Creek, which had given the Choctaws the option of taking allotments in Mississippi, had further provided that "Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever

remove are not to be entitled to any portion of the Choctaw annuity." It will be remembered, moreover, that during the entire course of their national life in the West the Choctaws had encouraged the immigration of their people from Mississippi and had freely admitted them to citizenship.

An act of June 7, 1897, made it the duty of the Dawes Commission to report to Congress whether or not the Mississippi Choctaws were entitled to citizenship privileges. The Commission then made an investigation and reported that to be eligible for enrollment it would be necessary for such Indians to take up a bona fide residence in the Choctaw Nation and establish their identity as the descendants of those who had elected to take allotments under the treaty of Dancing Rabbit Creek. The Curtis Act then made it the duty of the Commission to identify them.

* * *

> . . . In April of 1901, representatives of the Commission went to Mississippi, where they spent more than a year trying to identify all the fullbloods of that region. . . .
>
> In 1903 Congress made an appropriation to aid these fullbloods in removal, and before the year was over about three hundred were brought by train, and assisted to settle in the Choctaw country. . . .

As to the Choctaws who remained in Mississippi, it appears that no special Congressional legislation was addressed to them or their status. No federal statutes or cases can be located which treat them as a distinct tribe; all recognition given them until the termination of the Choctaw Nation in 1906 was as separated brethern of the tribe in the west. Since 1830, the United States govern-

ment had regarded the Mississippi Choctaws as emancipated; it conferred no tribal status on them and provided for them no reservation.

In 1920, this Court in *Winton* v. *Amos*, 255 U.S. 373 (1920) summarized the status of the Mississippi Choctaws during the 1830-1918 period (255 U.S. at 378):

> . . . Choctaws who remained in Mississippi under that article adopted the dress, habits, customs, and manner of living of the white citizens of the State. They had no tribal or band organization or laws of their own, but were subject to the laws of the State. They did not live upon any reservation, nor did the Government exercise supervision or control over them. No funds were appropriated for their support, though much land was given to them. Neither the Indian Office nor the Department of the Interior assumed or exercised jurisdiction over them, and they never recognized them either individually or as bands, but regarded them as citizens of the State of Mississippi, and the Department held it had no authority to approve contracts made with them.

Efforts to obtain federal relief for Mississippi Choctaws proved futile until 1918.

C. 1918-1931: Relief Measures.

In 1908, the Commission of Indian Affairs sent an agent to Philadelphia, Mississippi, to investigate the conditions of the Choctaws in that area. T. Bounds, Children of Nanih Waiya 53 (1964). A decade later, Congress provided for their relief via an appropriations bill for the Bureau of Indian Affairs. Under the heading, "MISSISSIPPI" the Act of May 25, 1918, 40 Stat. 561. 573, provided:

For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000.00; for their education by establishing and maintaining day schools including the purchase of lands and the construction of necessary buildings, $20,000.00; and for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, *to be expended under conditions to be prescribed by the Secretary of the Interior for repayment to the United States under such rules and regulations as he may direct, $25,000.00;* for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton and other crops, $25,000.00, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, *to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June Thirtieth, Nineteen Hundred and Twenty-Five;* in all, $75,000.00 to be immediately available. (Emphasis added)

Bounds, *supra*, p. 53, states:

> A special agent was sent to Philadelphia, Mississippi in 1918, and he found that the Choctaws did not attend school and were generally leading an isolated life. The great majority of the Indians were living in Neshoba, Leake, Newton, Scott, Jones, Winston and Noxubee Counties. The poor health, education and economic status of the people led to the establishment of an agency at Philadelphia in 1918.

Obviously the Act of May 25, 1918 was a relief measure. It neither refers to the Choctaws of Mississippi as a tribe nor makes any mention of a reservation. Its language indicates that it was intended to provide land for families or on an individual basis, not in community or in common. Further it provided for repayment to the United States. The Commissioner of the Bureau of Indian Affairs had formally reported to Congress that the Mississippi Choctaws did not live on a reservation, and he declined to recommend that Congress create one. 56 Cong. Rec. 1138 (1918).

Bounds, *supra*, pp. 55-62, comments:

> The land purchase program was initiated in 1921. Under this program, the government bought a tract of land, sub-divided it into twenty to forty acre plots, and built a small house on each plot. The land was resold to the Indians on a reimbursable basis. . . . From 1921 until 1932, the Government bought 3,680 acres of land for the Choctaws. It was sold to 88 Indians on the reimbursable Plan. All of them defaulted in payment.

If the 1918 appropriation failed in its purpose, it nevertheless provided an entree for the Department of Interior with respect to attempting to gain control over some, if not all, of the Mississippi Choctaws. (See Appendix to *United States* v. *State Tax Commission*, 535 F.2d 300 (5th Cir. 1976), attached as Appendix to this brief, for a discussion of the Legislative History of the Act of May 25, 1918.)

D. 1930's-1940's: Growing Federal Control.

The argument for exclusive federal jurisdiction over Mississippi's Choctaws, as expounded by John and the

Government, seems to rest on three legs: (1) The Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 784, also known as the Wheeler-Howard Act); (2) The Act of June 21, 1939, 53 Stat. 851, defining the status of lands purchased for the Choctaws of Mississippi; and (3) a Proclamation dated December 4, 1944, by the Department of Interior proclaiming a reservation and tribal status for Mississippi Choctaws. As will be shown below, the Indian Reorganization Act had and has no applicability to Mississippi Choctaws, the 1939 enactment could not do more than its stated purpose, and the Proclamation was invalid and ineffective to oust Mississippi's jurisdiction over certain of its citizens.

(1) The Indian Reorganization Act.

As indicated above, the Choctaws who remained in Mississippi after the Treaty of Dancing Rabbit Creek did so as individuals; they were not obligated to live in any one place and consequently moved as individuals to various areas of the state and beyond its borders. Some rejoined the tribe in Indian Territory. As noted in *Winton* v. *Amos, supra,* "They had no tribal or band organization or laws of their own . . . They did not live upon any reservation, nor did the Government exercise supervision or control over them." Even the Act of May 25, 1918 providing "For the relief of distress among the full-blood Choctaw Indians of Mississippi" did not indicate where these "full-blood Choctaw Indians" were located nor exactly how it was to be determined which were "full-blood." Since the Choctaw Manpower and Demographic Survey [filed with the Clerk; see n. 7 at Page 8 of the Mississippi Band of Choctaw Indians as Amicus Curiae] notes that Choctaws presently live in most of Mississippi's [82] counties and in Western Tennessee it is not unreasonable

to assume that they ranged rather widely over Mississippi in the 1920's and 1930's.[9]

Professor Peterson, an authority cited by John, in his dissertation (*The Mississippi Band of Choctaw Indians: Their Recent History and Current Social Relations,* U. of Georgia Ph.D. Thesis, 1970) notes (at page 34):

> Even today, one finds a few isolated examples of such groupings in the Machulaville area of Noxubee County northwest of Philadelphia, where Choctaws have avoided contact with the Choctaw Agency.

At page 78 he notes the efforts of Catholic missionaries to bring the Choctaws into a community in the late 1880's and 1890's and comments:

> It is noteworthy that this effort occurred . . . twenty years before the Federal Government became interested in the conditions of the Mississippi Choctaws, and thirty-six years before the Federal Government began following the same general policy of land purchases. . ."

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9. Peterson's dissertation contains in its Appendix a map titled, "Location of Choctaw Population in Mississippi, 1960." It indicates a population estimated at between 2,994 and 3,362 living in 58 of Mississippi's 82 counties. Seven counties are designated "Choctaw Agency Service Area" and have Choctaw populations of 1,212; 519; 384; 235; 115; 45; and 38. The remaining 51 counties have Choctaw populations estimated at: 34 counties, 1-9; 6 counties, 21-29; 4 counties, 10; 2 counties, 51-59; 2 counties, 11-19; and one county (each) with 31-39, 41-49, 50, and 115. Peterson comments, at page 147: "As late as 1962 only 32 percent of Choctaw households had automobiles and only 11 percent had trucks. As a result, Choctaws in different communities were isolated from each other." This geographical diversity of Mississippi Choctaws and attendant communication difficulties as noted in the 1960-62 period raises serious question about the difficulty of locating and serving "full-blood" Choctaws under the 1918 relief measure and applying provisions of the 1934 Indian Reorganization Act to the group reelections requiring a majority of the tribe, etc.

And, at pages 139-140:

> The creation of the Choctaw Agency in 1918 provided a non-Choctaw leadership structure for coordinating and directing the various programs for the Choctaw people. However, it was not until 1935 that a recognized body of spokesmen for the Mississippi Choctaws was formed as a result of an affirmative vote by the Choctaw people as provided under the terms of the Indian Reorganization Act of 1934. The Business Committee was approved and sponsored by the Agency, but confusion resulted when an opposing faction of Choctaws formed the Mississippi Choctaw Indian Federation to protest the formation of the Business Committee. The Choctaw Business Committee, however, continued as the recognized tribal government although in actuality, it had little or nothing to govern.

Also:

> Since its organization in 1945, the Tribal Council has had no voice in the management of any programs of the BIA, and its own programs have been almost non-existent.

Bounds, *supra,* has written:

> After the treaty of Dancing Rabbit Creek, there was no tribal government until the organization of the Choctaw Business Committee in 1934. This committee was composed of seventeen members selected from the seven communities, four communities selecting only two members each. In September that year the committee met and elected officers.
>
> An opposing faction organized the Mississippi Choctaw Indian Federation, which was not recognized or approved by the Indian Bureau.

Thus, it would appear, that the Department of Interior, utilizing the agency set up to handle the 1918 relief funds, put together some semblance of an organization among such Choctaws as it could find near its Philadelphia, Mississippi office. As to other Mississippi Choctaws in other sections of the state, the record appears silent.

With this background in focus, attention can now be directed more explicitly at the purpose and language of the Indian Reorganization Act.

In *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 Michigan L. Rev. 955 (1972), it states [at 961-962]:

> The Wheeler-Howard Bill, as the originally proposed legislation was known, was entitled an act "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self government and economic enterprise." The bill represented a significant change in the approach to Indian legislation. Although the original Wheeler-Howard Bill was greatly restructured in the final version that became the IRA, some knowledge of its provisions is useful.
>
> Title I of the Wheeler-Howard Bill, "Indian Self-Government", was the heart of the proposed legislation. In it were set forth the broad principles of self-government and the specific policy goal that "those functions of government now exercised over Indian reservations by the Federal Government through the Department of Interior and the Office of Indian Affairs shall be gradually relinquished and transferred to the Indians of such reservations. . . ."

Another article, written closer in time to the passage of the Indian Reorganization Act, Krieger, *Principles of*

the Indian Law and the Act of June 18, 1934, 3 Geo. Wash. L. Rev. 279 (1935) notes [at 296]:

> The portion of those Indians who are not inclined to give up their tribal allegiance remains considerable and renders the execution of the original policy of incorporating all Indians into the general legal system impossible.
>
> Grave and long disregarded inconveniences in the relations between the Federal Government and the Indian tribes made decisive action necessary. Thus the Wheeler-Howard Bill came into existence, preceded by proper negotiations between the present administration of the Indian Bureau and the Committees of Indian Affairs of the Senate as well as the House of Representatives.

And, as reported by Felix S. Cohen, *supra*, page 84:

> More briefly the objectives of the legislation are summed up in the report presented by Senator Wheeler, one of the co-sponsors of the measure, on behalf of the Committee on Indian Affairs, of which he was chairman. The report recommending enactment of the measure [Sen. Reprt. No. 1080, 73d Cong., 2d sess. (May 10 (calendar day, May 22), 1934)] declared:
>
> > The purposes of the bill, briefly stated, are as follows:
> >
> > (1) To stop the alienation, through action by the Government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support of these Indians.
> >
> > (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who

> > are anxious and fitted to make a living on such land.
> >
> > (3) To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
> >
> > (4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations.
> >
> > (5) To establish a system of financial credit for Indians.
> >
> > (6) To supply Indians with means for collegiate and technical training in the best schools.
> >
> > (7) To open the way for qualified Indians to hold positions in the Federal Indian Service.

Cohen also cautions,

> The first eight sections of the law as finally enacted correspond to the provisions of the bills considered and reported by the House and Senate Committees. In the remaining sections of the measure as finally enacted, various combinations and compromises were made between two different drafts which passed the two houses and, therefore, the House and Senate debates and committee reports must be read with caution.

And, at page 85:

> Sections 16 and 17 deal with the problem of tribal organization and tribal incorporation. Since these sections were the work of a conference committee, which

took phrases from the bill that had passed the House and other phrases from the bill that had passed the Senate, the House and Senate committee reports and legislative history prior to the conference report must be used with extreme circumspection, in aiding the interpretation of these two sections. . . .

It appears from the above that the chief thrust and intent of the Indian Reorganization Act was directed at "Indians living under Federal tutelage" and "Indians who are not inclined to give up their tribal allegiance" and further to "To stop the alienation (of Indian) lands" and "To stabilize the tribal organization of Indian tribes."

As has been previously shown, at that time, Mississippi Choctaws were not living under Federal tutelage, had no tribal organization and were *given* land under the terms of Article XIV of the Treaty of Dancing Rabbit Creek and *sold* land under the provisions of the government's relief act of 1918. [It is interesting to note that Cohen, *supra* at page 273 writes: "It has been administratively determined that those Choctaws remaining in Mississippi when the Choctaw Tribe removed to Indian Territory lost their tribal status and could not be recognized as a separate tribe." Memo, Sol. I.D., August 31, 1936.]

If the purpose of the Act was in any way directed to the Mississippi Choctaws, the language of the Act conceals it. Note especially the language of Section 16:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election

> authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. . . .

As has been previously indicated, there was no Indian tribe in Mississippi at the time and no Indian reservation. It is impossible to speculate on what might constitute a "majority" of the "tribe" because of the geographic diversity of the Choctaws and attendant communication difficulties.[10]

It is argued, however, that the Indian Reorganization Act could be made applicable to Mississippi Choctaws in that in Section 19 the term "Indian" is defined. Cohen, *supra*, writes at page 5:

> A recent statutory definition of an Indian is that contained in the Indian Reorganization Act, which in section 19 provides:
>
> > The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.
>
> For the purposes of this Act, Eskimos and other aboriginal people of Alaska shall be considered Indians.
>
> In this act as in the foregoing acts, the definition of "Indian" is limited in its connotation to the purposes of the legislation.

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10. Contrast with the Department of Interior's extensive anthropological research in *Maynor* v. *Morton*, 510 F.2d 1254 (D.C. Cir. 1975).

Ignoring the possible conflict between the provisions of the relief act of 1918 for "full-blood" Indians and the Indian Reorganization Act's provisions for "persons of one-half or more Indian blood", it is submitted that the Indian Reorganization Act in neither purpose or intent was or is directed to the Mississippi Choctaws. (*Arguendo*, if the phrase "and shall further include all other persons of one-half or more Indian blood" is determinative, there would be no need for the two previous definitions of "Indian" since this phrase alone would be sufficient.)

[It is of interest to note that Section 13 of the Act exempted the Choctaw Tribe in Oklahoma, yet this same Act is cited as the vehicle which created tribal life for the non-tribal Choctaws of Mississippi.]

(2) Act of June 21, 1939, c. 235, 53 Stat. 851.

John's brief (pages 30-31) argues:

> The 1939 Choctaw statute was passed at the request of the Interior Department, and its purposes were stated in the House Report:
>
> *Specific effect of the bill if enacted*—It will place all those lands purchased under the authority of the various resale acts in the same status as the lands being purchased under the authority of section 5 of the Indian Reorganization Act for the Mississippi Choctaws.
>
> *Advantages*—It will avoid many administrative problems which will arise otherwise; will insure a more productive use of the lands; and will facilitate matters greatly if the Indians should choose to organize under section 16 of the Indian Reorganization Act, and take over administration of their lands.

> Thus Congress in 1939, only five years after the I.R.A. expressly recognized that the Mississippi Choctaws are within that Act.

With all deference to John, it is respectfully suggested that the recognition was more on the part of the Interior Department than of Congress. The Interior Department had been struggling for years with the peculiar problem of lands for the Choctaws in Mississippi. As noted by Peterson:

> (Pages 119-120) While the purchase of farms for individual Choctaws did accomplish some success in concentrating the Choctaw population and improving the living condition of individual Choctaw families, it was almost a total failure in its expressed aim of establishing the Choctaws as rural land owners. Two thousand five hundred and forty-nine reimbursable loans covering purchase of farms and supplying of equipment and supplies were made to a total of 479 Choctaws. Of these almost 80 percent were delinquent and unpaid in 1946.
>
> (Pages 123-125) The defaulting of most farm loans forced a reevaluation of the land purchase program. On June 21, 1939, a Congressional Act provided that titles to lands purchased with reimbursable funds upon which payments were defaulted were to become trust lands held by the United States Government for the Choctaw Indians living in Mississippi, who were at least one-half Choctaw blood. (Statutes at Large of the United States, LV, Part 11:851). Under this Act, during 1940 and 1941 the majority of land purchased under the reimbursable loans for supplies and equipment were not immediately cancelled, but remained largely uncollectable.

Meanwhile, in 1937, the Agency began purchasing additional lands under the Indian Reorganization Act of 1934. A total of almost 12,500 acres were purchased for trust land under this program, with all but one thousand being acquired before 1944. This land, plus the approximately four thousand acres purchased originally under the reimbursable plan with reimbursable funds, brought the total lands to approximately 16,500 acres.

Much of this additional land was unsuited for agriculture, but as late as the early 1940's, the Choctaw Agency was attempting to clear some of this newly purchased land and establish additional forty acre farms in the Pearl River community. This continuing emphasis on agricultural development by the Choctaw Agency was in accord with the general direction of the Bureau of Indian Affairs policies . . . This agrarian policy was promoted even for tribal groups who were far less involved in agriculture than were the Choctaws.

> (Page 125-126) In the case of the land purchase program, however, the Choctaws, by and large, did not conform to government expectations that they would purchase farm land, and as a result, the government ended up placing the land in trust for the Choctaws even though they did not purchase it.

Probably the last sentence quoted above states the real point of the Act of 1939: The Department of Interior had purchased land for the Choctaws, seen its land program come to conflicts with *its* expectations for the Choctaws and, instead of retreating, bought more land to hold.

In any event, the language of the Act hardly supports the arguments made for its vitality and purpose:

> AN ACT To define the status of certain land purchased for the Choctaw Indians, Mississippi.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts for resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Again, no reference to a tribe or a reservation is included in this legislation. It is simply an act to define the status of certain land purchased for the Choctaws of Mississippi, nothing more.

John's brief raised curious questions as to chronology concerning the Choctaws of Mississippi and the Interior Department's agents. At page 12 of his brief we are told, with regard to the Indian Reorganization Act:

> On March 30, 1935, the Act was voted on by the Mississippi Choctaws and they accepted it.

Yet we note in the brief, at pages 30-31, the quotation from the House Report giving the supposed advantages of the 1939 Act which says:

> . . . and will facilitate matters greatly if the Indians should choose to organize under section 16 of the Indian Reorganization Act.

And Peterson states that in 1937 lands had been purchased under the Indian Reorganization Act. Apparently use of the Indian Reorganization Act with regard to Mississippi Choctaws was something of an elective or selective thing during the 1930's.

(3) Proclamation of December 4, 1944.

Under date of December 4, 1944, Oscar L. Chapman, Assistant Secretary of the Department of Interior, issued a proclamation declaring the lands purchased in Mississippi to be an Indian reservation. (In the proclamation he also made reference to "the recognized tribal authorities of the Mississippi Band of Choctaw Indians." A copy of the proclamation is attached as an appendix to the opinion given in *United States* v. *John* by the United States Fifth Circuit Court of Appeals.) The proclamation attached, as Exhibit A, a legal discription of the lands covered by the proclamation.

There is no indication in these consolidated cases as to the rationale behind the land purchases made by the Department of Interior, although the list appended to the proclamation presents a curious configuration for any type of "reservation." It lists the following counties and acreage:

Attala	40
Jones	320
Leake	1,721 6/7
Neshoba	10,232.6
Newton	767
Kemper	223
Scott	110

Although the tracts purchased were neither continuous nor contiguous, six of the seven counties were/are contiguous, Jones being removed from the others by intervening Jasper county. [Only five of these counties are listed in the Choctaw Agency Service Area given by Peterson, *supra*, in his appendix; apparently Attala and Scott counties are not now served but an additional two, Winston and Noxubee are.] The tracts appear to range in size from three to 640 acres in size.

The indictment of John alleged that the offense took place "in the NE 1/4 of Section 35, Township 11 N Range 7 E" in Leake County, Mississippi. *Arguendo*, if the proclamation were effective to create a *reservation*, the land encompassed would do severe violence to the ends sought to be achieved through the enactment of 18 U.S.C. §1151, see *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

But the proclamation was grounded in the Indian Reorganization Act and therefore was a nullity insofar as being determinative of the issue of federal-state jurisdiction in these consolidated cases. As has been previously shown, the Indian Reorganization Act could not and did not pertain to Mississippi Choctaws and the 1939 land status act was nothing more than a definition of title. The proclamation could not and did not transform an administrative agency's problems into a Congressional enactment creating a tribe, a reservation, or a wardship status for Mississippi Choctaws.

E. Mississippi Choctaws Today.

Although more interested in anthropological study than in legal consideration, Peterson, *supra*, provides valuable background information for appropriate study of the cases now under consideration. He writes (pages 6-7):

. . . After Choctaw removal, the sand clay hills region was gradually transformed into a region of small subsistence farms, few of which were large enough to permit slave holding. The major roads of white civilization avoided the region, and absence of large cash crops gave little cause for major roads connecting the region with other parts of Mississippi. The region was far from completely isolated, but it was definitely a bypassed area. Generations of white, Negroes, and Choctaws lived out their lives largely unnoticed by the rest of Mississippi or the nation.

The remaining Choctaws shared the fate of other people in the sand clay hills. As an agricultural people, they adapted to the white settlement first by remaining squatters on marginal land and later by becoming sharecroppers, as did most Negroes and some whites following the Civil War. Living on scattered isolated farms, there was little in Choctaw culture to excite the curiosity of the tourist. Even "native" Mississippians outside the sand clay hills are often surprised to learn that one of the largest Indian groups in the Southeast resides in their state.

And (at page 109):

> The Choctaws, Mississippi whites, and the Bureau of Indian Affairs all claim some credit for the establishment of the Choctaw Agency. . . . Older Choctaws . . . state that the Choctaw leaders took their complaint to the governor of Mississippi and to Senator Vardaman, and as a result, the Senators and Representatives from Mississippi became active in promoting the claims of Mississippi Choctaws. When they were unsuccessful in attempting to prevent the Oklahoma Choctaw rolls being closed against the Mississippi Choctaws (Report of the Commissioner of Indian Affairs, 1918:84), they became the active supporters of a bill *to provide services* to the Choctaws in Mississippi. Editorial support from Mississippi newspapers also helped bring attention to the *needs* of the Choctaws (Rand, 1940:143). (Emphasis added).

Angus McEachran, writing of Mississippi Choctaws in a feature of the Memphis, Tennessee *Commercial-Appeal*, March 18, 1973, §1, at 1 commented:

> . . . Indeed, as a recent survey indicated, most Indians do not acknowledge any kind of problem. This despite the fact that 68 percent live on income under the national poverty level, one-third are unemployed and one-third are underemployed.
>
> Maybe they would have been more candid had the survey about Indians been taken by Indians. That is a great part of the problem. The Indians are tired of the white man doing for them. Their suspicions run deep. They want to do for themselves.

But, it is argued by the Government, Mississippi Choctaws are a "Dependent Indian Community" and therefore (at page 24):

> . . . there is no legal significance in the fact that the Mississippi Choctaws had an intervening period of independence which regrettably served only to demonstrate their need for continued protection by the United States.

Thus the picture comes into focus. The position of Appellants-Respondents and Petitioners apparently is that relief measures alone are not enough (via Congress' 1918 Act) but full dependence (on the Bureau of Indian Affairs) is necessary and must be continued. If this is indeed accurate and proper, Congress has not yet provided for it and, absent Congressional enactments, the facts re-

main that the Mississippi Choctaws today are not a lawful and valid tribe, are not wards of the Government, and do not inhabit a valid and lawful reservation.

IV. The Consolidated Cases Before the Court Must Be Affirmed.

The nexus of the cases consolidated and now before the Court is that both hold that state, not federal jurisdiction, obtains with regard to criminal charges against Mississippi Choctaws. If the federal court had competent jurisdiction, jeopardy attached, the Major Crimes Act giving exclusive jurisdiction to federal courts for those crimes committed by Indians in Indian country. However, the federal courts in Mississippi had no jurisdiction, there being no Indian country in Mississippi. Jeopardy does not exist from conviction or acquittal in a court lacking competent jurisdiction. *Diaz* v. *United States*, 223 U.S. 442 (1912); *McCleary* v. *Hudspeth*, 124 F.2d 445 (10th Cir. 1941), *cert. den.* 316 U.S. 670 (1942).

The argument of Appellants-Respondents and Petitioners on jurisdiction is that 18 U.S.C. §1153 covers offenses committed within Indian country, that 18 U.S.C. §1151 defines Indian country and that the land purchased by the United States in Mississippi and held in trust for the Mississippi Choctaws is "Indian country." Section 1151 states that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities . . ."

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the Mississippi Choctaws is "Indian country." Section 1151 states that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities . . ."

But, Mississippi has had jurisdiction over the land in question since at least 1831. The record is absolutely devoid of any indication of Mississippi agreeing to any termination of this jurisdiction, (Public Law 280, 67 Stat. 588 (1953), was inapplicable to Mississippi because the state already had the jurisdiction offered via this act.)[11]

Further the record is absolutely devoid of any specific congressional act attempting to recreate a tribe of Indians in Mississippi from those citizens who chose to remain in the state following the Choctaw Tribe's removal after the Treaty of Dancing Rabbit Creek. The record is also devoid of any Congressional enactment mentioning a wardship status for Mississippi Choctaws. The record is devoid of any Congressional enactment creating a reservation in Mississippi.

Opposing briefs herein argue after-the-facts justification. Mississippi merely urges a logical and rational view of the historical realities and the attendant legal consequences. Government and John repeatedly cite *United States* v. *McGowan*, 302 U.S. 535 (1938); however, it must be noted that the Court states [at page 539]:

> The Federal prohibition against taking intoxicants into this Indian colony does not deprive the

---

11. There is absolutely no evidence of Congressional enactments, State of Mississippi legislation or otherwise that the State of Mississippi was requested to or ceded jurisdiction over the subject lands to the United States government. The lands in question, presumably, were purchased from private parties over the years without the knowledge or consent of the State of Mississippi.

> State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation within the colony, of such state as conflicts with the Federal enactments.

Thus in *McGowan,* the Federal Government was not asserting exclusive jurisdiction; further it appears that there was no challenge to the wardship status of the Indian residents. Additionally, it appears that the land in question was continuous and unbroken by areas owned by parties other than the federal government; it may be assumed that only Indian wards occupied the land also. In the instant cases, exclusive federal jurisdiction is asserted over some 19,000 acres, neither continuous nor contiguous, only a portion of which are occupied by Mississippi Choctaws.

CONCLUSION

Unless Federal Indian law is grounded in impermissible racial considerations, it must flow from constitutionally prescribed *tribal* perspectives. In the case of the Choctaws, the tribe was removed from Mississippi in accordance with a properly-ratified treaty. Individuals were permitted to remain behind as citizens of Mississippi. For almost a century they were subject only to state jurisdiction. Attempts to provide them with economic advancement via rejoining their kinsmen in the Indian Territory came to naught, but Congress provided for their relief as it has often provided for the relief of economically distressed people. From this relief measure, the government through its Department of Interior has built a structure now asserting dominion over these people and a consequential ousting of the state's jurisdiction over some 19,000 acres of Mississippi land. There is no legislative cement supporting this position. The courts below correctly analyzed the situation and properly applied relevant legal principles. Their judgments must be affirmed.

Respectfully submitted,

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CERTIFICATE

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This, the 4th day of April, A. D., 1978.

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APPENDIX

UNITED STATES of America et al.,
Plaintiffs-Appellees,

v.

STATE TAX COMMISSION OF the
STATE OF MISSISSIPPI et al.,
Defendants-Appellants.

No. 73-3034.

United States Court of Appeals,
Fifth Circuit.

Dec. 13, 1974.

The United States brought suit on behalf of Mississippi Band of Choctaw Indians to enjoin the Mississippi State Tax Commission from assessing, collecting, and attempting to collect sales taxes from a construction company which was formed at request of tribal council. The United States District Court for the Southern District of Mississippi, at Jackson, William Harold Cox, J., entered judgment granting a permanent injunction, and the Commission and the sheriff of Neshoba County appealed. The Court of Appeals, Coleman, Circuit Judge, held that the construction company was an entity separate and distinct from the Mississippi Band of Choctaw Indians, the group named as beneficiary of the exemption in Mississippi's sales tax statutes, that the United States was attempting to lend its name to a suit on behalf of a private corporation and was not the real party in interest, and that tribal character of Choctaw Indians in Mississippi came to an end when the United States Senate ratified the Treaty of Dancing Rabbit Creek in 1831, and the Mississippi Choctaws

did not become a tribe and live on a reservation as result of the Wheeler-Howard Act of 1934 and proclamation of the Department of Interior issued in 1944.

Reversed and remanded with directions.

1. Corporations (Key) 1.3

Under Mississippi law, a corporation is an entity separate and distinct from its stockholders.

2. Corporations (Key) 1.1(2), 1.3

In Mississippi, a corporation is a creature of the law and it is a legal personality, separate and apart from that of its owners.

3. Corporations (Key) 1.5(2)

Corporate fiction is not to be disregarded because of mutuality of corporate names, stockholders and officers, under Mississippi law.

4. Corporations (Key) 1.5(3)

Fact that one entity owns all stock in the other is not determinative of whether corporate fiction may be disregarded.

5. Corporations (Key) 1.6(11)

In determining whether construction company formed at request of tribal council was an entity separate and distinct from Mississippi Band of Choctaw Indians, the group named as beneficiary of exemption in Mississippi's sales tax statutes, the test was whether the construction company as a corporation actively owned and conducted its own business. Code Miss.1942, § 10116.

6. Corporations (Key) 1.7(2)

Although construction company was formed at request of tribal council and its directors were all members of Mississippi Band of Choctaw Indians, the company, which was chartered under Mississippi law, was an entity separate and distinct from the Mississippi Band, which was group named as beneficiary of exemption in Mississippi's sales tax statutes, in view of evidence showing that tribal council was not the same as the construction company, that 35% of company's employees were not Indians, and that the houses being built could be occupied by those who were not Indians.

7. Federal Civil Procedure (Key) 139

In view of showing that construction company formed at request of tribal council was an entity separate and distinct from Mississippi Band of Choctaw Indians, which was group named as beneficiary of exemption in Mississippi's sales tax statute, the federal government, which brought suit on behalf of the Mississippi Band to enjoin Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from the construction company, was attempting to lend its name to a suit on behalf of a private corporation and was not the real party in interest, as required by federal rule. Code Miss.1942, § 10116; Fed.Rules Civ.Proc. rule 17(a), 28 U.S.C.A.

8. Courts (Key) 302

Statute vesting federal courts with jurisdiction of actions commenced by the United States did not give district court jurisdiction to hear action brought by the United States on behalf of Mississippi Band of Choctaw Indians to enjoin Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from con-

struction company which was formed at request of tribal council, but which was an entity separate and distinct from the Mississippi Band. 28 U.S.C.A. § 1345.

9. Indians (Key) 27(2)

Statute vesting district courts with original jurisdiction of all civil actions brought by an Indian tribe wherein controversy arises under the Constitution, laws or treaties of the United States did not furnish jurisdictional basis for action brought by the United States on behalf of Mississippi Band of Choctaw Indians to enjoin Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from construction company which was formed at request of tribal council, but which was an entity separate and distinct from the Mississippi Band. 28 U.S.C.A. § 1362.

10. Courts (Key) 262.8(1)

Statute prohibiting a federal court from enjoining assessment of a state tax where a plain, speedy and efficient remedy exists in state court was applicable so as to preclude district court from entertaining action brought by the United States on behalf of Mississippi Band of Choctaw Indians to enjoin Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from construction company which was formed at request of tribal council, but which was an entity separate and distinct from the Mississippi Band. 28 U.S.C.A § 1341.

11. Indians (Key) 3

Under the Treaty of Dancing Rabbit Creek, any individual who decided to remain in state of Mississippi could not be denied privilege of joining his brethren in

Indian territory, but was cut off from any portion of annuity payable to the tribe under the treaty, because he had already received his compensation in form of land.

12. Indians (Key) 3

When Treaty of Dancing Rabbit Creek was ratified by United States Senate in 1831, the tribal character of the Choctaw Indians in Mississippi came to an end.

13. Indians (Key) 3

The Choctaw Indians in the state of Mississippi, whose tribal character came to an end when the United States Senate ratified the Treaty of Dancing Rabbit Creek in 1831, did not become a tribe and live on a reservation as a result of the Wheeler-Howard Act of 1934. Wheeler-Howard Act, § 19, 25 U.S.C.A. § 479.

14. Indians (Key) 6

The Choctaw Indians in the state of Mississippi, who voted to accept benefits of the Wheeler-Howard Act, could not confer upon themselves the benefit of a law in which, by its very terms, they had not been included. Wheeler-Howard Act, § 19, 25 U.S.C.A. § 479.

15. Indians (Key) 6

Failure of Wheeler-Howard Act of 1934 to include Choctaw Indians in state of Mississippi, whose tribal character came to an end when United States Senate ratified Treaty of Dancing Rabbit Creek in 1831, was not and could not have been cured by 1944 proclamation of the Department of the Interior which was grounded on the Act, which purported to recognize tribal organization of the Mississippi Band of Choctaw Indians, and which at-

tempted to declare that the lands purchased for their use and held for them in trust was an Indian reservation; and such proclamation was not binding on state of Mississippi in exercise of its lawful authority over its citizens, human or corporate. Wheeler-Howard Act, § 19, 25 U.S.C.A. § 479.

James Holmes Haddock, Jackson, Miss., Carl F. Andre, A. F. Summer, Atty. Gen. of Miss., Jackson, Miss., for defendants-appellants.

Robert E. Hauberg, U. S. Atty., James B. Tucker, Asst. U. S. Atty., Jackson, Miss., Wallace H. Johnson, Asst. Atty. Gen., Lands Div., Larry G. Gutterridge, Jacques B. Gelin, Dept. of Justice, Washington, D. C., for plaintiffs-appellees.

Before COLEMAN, CLARK and RONEY, Circuit Judges.

COLEMAN, Circuit Judge:

This is an appeal by the Mississippi State Tax Commission and the Sheriff of Neshoba County from a judgment granting a permanent injunction against the assessment and collection of sales and contract taxes from the Mississippi Band of Choctaw Indians, the Chata Development Company, and the Choctaw Housing Authority. The District Court held that under the federal Constitution and a state exemption hereinafter described the Tribe and its instrumentalities were exempt from such taxes.

We reverse, with directions to dismiss the complaint for lack of jurisdiction.

FACTS

In 1965, to take advantage of low rent federal housing programs, the Mississippi Band of Choctaw Indians acted to establish the Choctaw Housing Authority.

In 1968, the Mississippi Legislature specifically exempted from sales tax "sales to the Mississippi Band of Choctaw Indians, but not to Indians individually", Section 8, Chapter 588, Miss.Laws, 1968. Exempting one group from the payment of taxes which other groups are required to pay, with no rational basis stated, raises substantial "equal protection" specters. For the purposes of this litigation the validity of the exemption is assumed, but that is an assumption only. In any event, the statutory exemption was granted solely to "the Mississippi Band of Choctaw Indians", with nothing said as to any separately identifiable agencies or subsidiaries or instrumentalities of the Band.

In 1970, at the request of the "tribal council", the Chata Development Company was *incorporated* under the laws of Mississippi as a non-profit corporation but for the purpose of engaging in certain aspects of the construction business [Chata is an ancient method of spelling "Choctaw"].

In 1971, Chata made a contract with the Choctaw Housing Authority to build some fifty houses for $696,772. On September 9 of that year the Tax Commission instructed Chata to file a return and pay the sales taxes required of a contractor. The "tribal council" replied by letter, claiming the benefit of the 1968 exemption.

In October, the Tax Commission informed Chata that neither it nor the Housing Authority (as distinguished from the Mississippi Band of Choctaw Indians) were exempt from sales tax on purchases and filed its notice

of tax lien and judgment in the sum of $19,161.23, solely against Chata, the non-profit corporation. On November 4, 1971, on the tax lien filed, the Tax Commission instituted garnishment proceedings against Chata.

There was no request filed with the State Tax Commission for a hearing, see sources cited in Section 27-65-45, Miss.Code, 1972. There was no suit in the Chancery Court for refund, or appeal to the Supreme Court, as authorized by Section 27-65-47, Miss.Code, 1972, and predecessor statutes. The remedial procedures provided by Mississippi law were wholly bypassed.

On May 18, 1972, the United States rode into the fray. It brought suit on behalf of the Mississippi Band to enjoin the Tax Commission from assessing, collecting, and attempting to collect sales taxes from the Development Company and the Authority. The suit also sought to have declared null and void the tax lien entered against Chata.

The District Court found that the United States was not the real party in interest (Rule 17(a), Federal Rules of Civil Procedure), allowed Chata Development Company, against whom the taxes had been assessed, to join the suit as the real party plaintiff, held that the Mississippi Legislature had exempted the Choctaw Band from the taxes in question, and permanently enjoined the defendants:

(1) from assessing, collecting, or attempting to collect any taxes levied by the provisions of the Mississippi State Tax law from the Mississippi Band of Choctaw Indians, Chata Development Company, and Choctaw Housing Authority;

(2) from assessing, collecting, or attempting to collect from any material men and suppliers furnishing materials to the Mississippi Band, Chata, or the

Choctaw Housing Authority any tax under § 10108, Miss.Code Ann., 1942;

(3) from proceeding further to collect the $19,161.23 alleged due in the cause then pending in Neshoba County Circuit Court;

(4) the tax lien was declared null and void.

Appellant State Tax Commission argues that the United States had no lawful authority to bring this action, that the District Court lacked jurisdiction of the parties and the subject matter, and that if a controversy existed it was for state administrative and judicial determination, rather than federal.

When this suit was initially filed, the United States asserted jurisdiction on 28 U.S.C. § 1345 and § 1362. In order for § 1345 to apply, suit must be brought by the United States, or one of its agencies or officers thereof. However, the District Court found that the United States was not the real party in interest and ordered that the Chata Development Company, a Mississippi corporation, be joined as a party plaintiff. Chata was joined, and the suit proceeded.

Whether Chata, the corporation, was obligated to pay the sales taxes required of it as the building contractor was the real issue in the case. As already indicated Rule 17(a), Fed.R.Civ.P. requires that *every* action be prosecuted in the name of the real party in interest. The United States sought to meet this requirement by alleging that the suit was brought on behalf of the Mississippi Band of Choctaw Indians, that Chata "is an instrumentality and subsidiary of the Tribe, established by tribal resolutions". In any event, the United States sought no recovery for itself but only on behalf of a corporate taxpayer.

The United States knew that it could not lend its name to a suit for the benefit of private litigants, United States v. San Jacinto Tin Company, 125 U.S. 273, 8 S.Ct. 850, 31 L.Ed. 747 (1888); State of Wisconsin v. First Federal Savings & Loan Association, 7 Cir., 1957, 248 F.2d 804, cert. denied 355 U.S. 957, 78 S.Ct. 543, 2 L.Ed.2d 533; Wright, Law of Federal Courts, 68 (2d Ed., 1970).

[1] This presents a problem because Chata had no contract with the Mississippi Band of Choctaw Indians, the group named in the statute as the beneficiary of the exemption. Moreover, Chata, as the contractor, was a corporation, chartered under Mississippi law. The benefits and privileges of such a charter had been sought and obtained when there could have been no doubt about the status imposed upon corporations by law. The law of Mississippi is that a corporation "is an entity separate and distinct from its stockholders", Illinois Central Railroad Company v. Mississippi Cotton Seed Products Company, 166 Miss. 579, 148 So. 371 (1933). Thus in an effort to avoid the taxes which Mississippi corporations are required to pay, Chata has cast itself in the untenable role of claiming the benefits and denying the burdens of the status which its incorporators voluntarily sought.

[2-5] The Mississippi rule is the same as the general rule, that a corporation is a creature of the law and it is a legal personality, separate and apart from that of its owners, Berger v. Columbia Broadcasting System, 5 Cir., 1972, 453 F.2d 991, cert. denied 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89; Burnet v. Clark, 287 U.S. 410, 53 S.Ct. 207, 77 L.Ed. 397 (1932); Overstreet v. Southern Railway Company, 5 Cir., 1967, 371 F.2d 411, cert. denied 387 U.S. 912, 87 S.Ct. 1700, 18 L.Ed.2d 634. The corporate fiction is not to be disregarded because of mutuality of corporate names, stockholders and officers. The fact that one entity

owns all the stock in the other is not determinative. The test is whether Chata as a corporation actively owned and conducted its own business, Overstreet v. Southern Railway Company, *supra*.

Chata's directors are all members of the Band but the testimony revealed that "the tribe is not the corporation" and that the Tribal Council is not the same as the Chata Development Company. The testimony further revealed that 35% of Chata's employees were not Indians and that the houses being built could be occupied by those *who are not Indians*.

[6, 7] In these circumstances, applying Mississippi law, we hold that Chata was an entity "separate and distinct" from the Mississippi Band of Choctaw Indians, the group named as the beneficiary of the exemption in Mississippi's Sales Tax statutes. The United States was attempting to lend its name to a suit on behalf of a private corporation and was not the real party in interest. When it so held, the District Court was right.

[8] In the absence of a justiciable interest on behalf of the United States, 28 U.S.C. § 1345 conferred no jurisdiction.

[9] Neither is 28 U.S.C. § 1362, of any jurisdictional assistance. Chata Development Company is not an Indian Tribe or Band. Even looking through the corporate form to the individual Indian incorporators would not help, for § 1362 contains no general grant of jurisdiction for a suit merely because an Indian is a party, 1 Moore's Federal Practice, § 0.74 [2.-2].

Since this is a Mississippi tax, imposed on the commercial activities of a Mississippi corporation, we detect no federal question in this case.

This does not eliminate all of the serious jurisdictional questions.

There is a specific Act of Congress, 28 U.S.C. § 1341, which reads as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The application of this statute to Mississippi tax collection procedures had the full dress consideration of this Court in Bland v. McHann, 1972, 463 F.2d 21, cert. denied, 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973).

We there stated that the statute applied to anticipatory action as well as to ongoing efforts to collect. It also applies to suits for refunds, 463 F.2d at 25. We there reaffirmed the proposition that Mississippi provides a "plain, speedy, and efficient" remedy within the meaning of the statute.

In *McHann* we concluded:

> "Taxpayers' complaints that the Mississippi remedy is inadequate appear in reality to be an argument that a better remedy would be available in the federal courts. Neither the judicial decisions nor § 1341 requires that the state remedy be the best remedy available or even equal to or better than the remedy which might be available in the federal courts. Section 1341 merely requires that the state remedy be 'plain, speedy and efficient.' Thus, in view of the district court's finding, this court's decision in *Monaghan* and our own independent review of the available state remedy, we conclude that the Mississippi remedy is plain, speedy and efficient." 463 F.2d 29.

In *McHann* we relied, as indicated, upon the jurisdictional holding in Shepherd v. Monaghan, 5 Cir., 1958, 256 F.2d 882, which was a Mississippi sales and use tax case and in which the right to recover improperly collected taxes was specifically held to afford an adequate remedy.

[10] The appellees should have invoked the aid of the State Courts in their quest for relief from the tax liability here at issue. The District Court had no jurisdiction to entertain the effort.

THE STATUS OF CHOCTAW INDIANS IN THE STATE OF MISSISSIPPI

Prior to 1871, when Congress put a stop to the practice, there existed a widespread procedure in which the United States made treaties with the respective Indian Tribes, particularly with reference to the acquisition of Indian lands.

Article 6, Clause 2, of the Constitution provides that all treaties made under the authority of the United States "shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". Consequently, these Indian treaties, when ratified by the Senate, assumed equal status with the Constitution itself as a part of the "supreme Law of the Land".

Prior to the final removal of the Choctaw Indian TRIBE from Mississippi to the Indian Territory, which occurred pursuant to the terms of the Treaty of Dancing Rabbit Creek, ratified by the Senate February 24, 1831, the United States made the following treaties with the Tribe:

Choctaw Indian TREATIES

(See Hutchinson's Miss.Code, 1848,
Chapter V, pp. 117-136)

Date	Place	Purpose
Jan. 3, 1786	Hopewell, in northwestern South Carolina	Defined the boundaries of the Choctaw Nation North of the 31° of North Latitude, East of the Natchez District.
Dec. 7, 1801	Fort Adams	Permitted the conversion of the Natchez Trace into a federal road; ceded 2,245,720 acres of land between 31° and the Yazoo River.
Oct. 17, 1802	Fort Confederation on the Tombigbee	To mark the boundary from the Chickasawhay to the Tombigbee.
Aug. 31, 1803	Ho-buckin-too-pa	Ceded 1,000,000 acres.
Nov. 6, 1805	Mt. Dexter	Ceded 4,374,244 acres.
Oct. 24, 1816	St. Stephens	Ceded land where Columbus, Mississippi, now stands.
Oct. 18, 1820	Doak's Stand On the Natchez Trace near present day Canton, Mississippi, negotiated by Gen. Andrew Jackson and Chief Pushmataha	Exchanged 5,000,000 acres in Mississippi for lands between the Arkansas, the Red, and Canadian Rivers.
Jan. 20, 1925	Washington	Agrees that all Indians living on the exchanged lands in Mississippi may remain there if they so desire and shall receive 640 acres.

The foregoing treaties culminated in the Treaty of Dancing Rabbit Creek, signed near present day Macon, Mississippi, ceding the last of the Tribal domain in Mississippi, 10,500,000 acres.

Contary to the practice followed in certain notorious cases, the Treaty of Dancing Rabbit Creek required no Indian to leave Mississippi. Permission to remain and become Mississippi citizens was expressly assured.

Article XIV of the Dancing Rabbit Treaty provided:

> *"Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so,* by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement, of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity." [Emphasis added].

[11] This article is self explanatory. The last sentence of Article XIV: "Persons who claim under this article shall not lose the privilege of a Choctaw citizen,

but if they ever remove are not to be entitled to any portion of the Choctaw annuity", meant that if the individual deciding to remain in Mississippi should ever choose to join his brethren in the Indian Territory he could not be denied that privilege, but he was to be cut off from any portion of the annuity payable to the Tribe under the Treaty, because he had already received his compensation in the form of land. See, Winton v. Amos, *post*.

In the beginning, one third (5,000) of the Choctaws elected to remain in Mississippi; the others were moved West in 1831, 1832, and 1833. Migration continued sporadically, however, and by 1900 only 2,000 Choctaws remained in Mississippi.[1] As a matter of fact, Greenwood Leflore, the head Chief of the Choctaws, whose boyhood home was on the Natchez Trace at French Camp in present day Choctaw County, chose not to go West, became an immensely wealthy man, and exercised his Mississippi citizenship by serving with distinction in the Mississippi State Senate.

The Dancing Rabbit Treaty opens with the following language:

> "Now, therefore, that the Choctaws may live under their own laws in peace with the United States and the State of Mississippi, they have determined to sell their lands east of the Mississippi."

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1. McLemore, A History of Mississippi, 1973, p. 88. Anyone interested in the history of this noble tribe of Red men should read: DeRosier, The Removal of the Choctaw Indians, U. of Tennessee Press, 1970; Debo, The Rise and Fall of the Choctaw Republic, U. of Oklahoma Press, 1961; Foreman, Indian Removal, U. of Oklahoma Press, 1953; Foreman, The Five Civilized Tribes, U. of Oklahoma Press, 1934.

All prior treaties and agreements where inconsistent with the Dancing Rabbit Treaty were declared null and void.

It was further ordained that no part of the land granted the Tribe should ever be embraced in any territory or state, Article IV.

Clearly the Tribe, as an entity, was never to be a part of any state or territory.

[12] Thus, by the specific language of the Treaty, there can be no doubt that when it was ratified by the Senate the tribal character of the Choctaw Indians in Mississippi came to an end.

DeRosier wrote, p. 128, "After more than thirty years of negotiations, the Choctaws had been persuaded to relinquish their precious homeland and emigrate to a new Indian territory in the west".

In Indian Removal, p. 31, Foreman writes that those who did not go west "preferred to stay and be incorporated in the state".

Insofar as the Government of the United States was concerned, the Choctaw Indians who remained in Mississippi after Dancing Rabbit were left in limbo for ninety years, less two (1830-1918).

Congress passed the Act of May 25, 1918 (40 Stat. at L. 573) appropriating monies for the Bureau of Indian Affairs. Under the heading "MISSISSIPPI" the following was provided:

> "For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000; for their education by

establishing and maintaining day schools including the purchase of lands and the construction of necessary buildings, $20,000; for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, to be expended under conditions to be prescribed by the Secretary of the Interior for repayment to the United States, under such rules and regulations as he may direct, $25,000; for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton and other crops, $25,000, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five; in all, $75,000 to be immediately available."[2]

This Act glaringly omits reference to the Mississippi Choctaws as a "tribe" and omits any mention of a "reservation". Obviously, none existed.

A special agent was sent to Philadelphia, Mississippi, in 1918, and he found that the Choctaws did not attend school and were generally leading an isolated life. The

2. The United States parted with title to the land either by specific grants in the 1830 Treaty or subsequent patents to private purchasers. It then repurchased this land in the Twentieth Century from the contemporary owners. The State has never by appropriate legislation consented to exclusive jurisdiction by the United States. The government was simply an ordinary proprietor. See Article I, Section 8, Clause 17, United States Constitution; Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963).

great majority of the Indians were living in Neshoba, Leake, Newton, Scott, Jones, Winston and Noxubee Counties. The poor health, education and economic status of the people led to the establishment of an agency at Philadelphia in 1918.

The land purchase program was initiated in 1921, Under this program, the government would buy a tract of land, sub-divide it into twenty to forty acre plots, and build a small house on each plot. The land was resold to the Indians on a reimbursable basis. From 1921 until 1932, the government bought 3,680 acres of land for the Choctaws. It was sold to 88 Indians on the reimbursable plan. None of it was ever paid for. The United States now holds it in trust for the Indians, Act of June 21, 1939, 53 Stat. 851.

In Winton v. Amos and others, known as Choctaw Indians, 255 U.S. 373, 41 S.Ct. 342, 65 L.Ed. 684 (1921), the Supreme Court had occasion to review, in depth, the status of the Mississippi Choctaws subsequent to the Dancing Rabbit Treaty. It is to be regretted that the lengthy and expositive analysis set forth in the opinion of the Court cannot be repeated here, but at 378, 41 S.Ct. at 344 we find the following:

> "The mixed-blood Choctaws who elected to remain in Mississippi were provided for under article 19, while the full bloods who remained and elected to become citizens of the state were provided for under article 14; hence fullblood Mississippi Choctaws have always been called 'Fourteenth Article claimants.' Choctaws who remained in Mississippi under that article adopted the dress, habits, customs, and manner of living of the white citizens of the state. They had no tribal or band organization or laws of their own, but were

subject to the laws of the state. They did not live upon any reservation, nor did the government exercise supervision or control over them. No funds were appropriated for their support, though much land was given to them. Neither the Indian Office nor the Department of the Interior assumed or exercised jurisdiction over them, and they never recognized them either individually or as bands, but regarded them as citizens of the State of Mississippi, and the Department held it had no authority to approve contracts made with them."

As late as August 31, 1936, as it appears in the record, the Solicitor of the Department of the Interior ruled that "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe".

The matter boils down to whether the Mississippi Choctaws became a tribe and live on a reservation as the result of the Wheeler-Howard Act (approved June 18, 1934, 48 Stat. 984) and the Proclamation of the Department of the Interior issued in 1944.

For the reasons hereinafter set forth our answer to both issues is in the negative.

Section 19 of the Wheeler-Howard Act reads as follows:

> "The term 'Indian' as used in this Act shall include persons of Indian descent *who are members of any recognized Indian tribe now under Federal jurisdiction,* and all persons who are descendants of such members who were, *on June 1, 1934,* residing within *the present boundaries of any Indian reservation,* and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act,

> Eskimos and other aboriginal peoples of Alaska shall be considered Indians. *The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.* The words 'adult Indians' where used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years." [Emphasis added].

The language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words "any recognized Indian tribe *now* under Federal jurisdiction" and the additional language to like effect.

[13, 14] The Mississippi Choctaws did not, in June, 1934 fall within the status prescribed by the Act. Their vote in 1935 to accept the benefits of the Act was not authorized by that statute. They could not confer upon themselves the benefit of a law in which, by its very terms, they had not been included.

[15] This omission was not, and could not have been, cured by a Proclamation of the Department of the Interior, grounded on the Act of 1934, which in 1944 purported to recognize the tribal organization of the Mississippi Band of Choctaw Indians and which attempted to declare that the lands purchased for their use and held for them in trust is an Indian Reservation. While this Proclamation may, until set aside in appropriate proceedings, be binding on the Secretary of the Interior, a matter about which Mississippi has no standing to complain, and about which we intimate no opinion, there was no authority in the statute cited in its support and the Proclamation is not binding on the State in the exercise of its lawful authority over its citizens, human or corporate.

Deciding the case before us, and purely in a jurisdictional context, we must reject the assertions of the United States that

> "The Mississippi Band of Choctaw Indians is an Indian tribe."

and

> "The Tribe [is] situated on the Mississippi Band of Choctaw Indians Reservation and in Indian Country in Mississippi over which the United States has exclusive jurisdiction."

Therefore, if we are mistaken in our first holding that the United States is not a real party in interest in the efforts of the corporation to avoid paying the taxes assessed against it, the result is the same. The District Court remains without jurisdiction to entertain the suit.

We intimate no opinion as to the liability of the corporation to pay the tax. It is a matter of state law and, for lack of jurisdiction, is not before us.

The judgment of the District Court is reversed, and remanded with directions to dismiss the complaint, without prejudice to the right of the plaintiffs to seek any appropriate relief provided by state law.

Reversed and remanded, with directions.

UNITED STATES of America et al.,
Plaintiffs-Appellees,

v.

STATE TAX COMMISSION OF the STATE OF MISSISSIPPI et al.,
Defendants-Appellants.

No. 73-3034.

United States Court of Appeals,
Fifth Circuit.

July 19, 1976.

Rehearing and Rehearing En Banc

Denied Oct. 27, 1976.

The United States brought suit on behalf of the Mississippi band of Choctaw Indians to enjoin the Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from a construction company formed at the request of the tribal council. The United States District Court for the Southern District of Mississippi, at Jackson, William Harold Cox, J., granted a permanent injunction. The Court of Appeals reversed and remanded with directions, 505 F.2d 633. The Supreme Court of Mississippi in the context of a criminal case then held that the State of Mississippi retains jurisdiction over criminal offenses committed by Indians on the Choctaw Indian reservation. The Court of Appeals on petition for rehearing, Coleman, Circuit Judge, then held that Congress has not indicated any desire or purpose to oust Mississippi of its jurisdiction over the Choctaw Indians, who have been its citizens, as declared by Treaty, for over 100 years, and jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired.

Petition for rehearing denied.

1. Indians (Key) 5

After ratification of Treaty of Dancing Rabbit Creek, Choctaw Indians who chose to remain in Mississippi were no longer an Indian tribe, but were citizens of Mississippi, not wards of the United States; they could reassume Choctaw tribal citizenship only by moving to Indian territory.

2. Indians (Key) 3

By remaining and accepting, or later claiming, lands allotted to those who wished to stay, individual Indian bound himself to provisions of Treaty of Dancing Rabbit Creek, provisions of which were binding both upon the tribe and the United States.

3. Indians (Key) 3

Treaty of Dancing Rabbit Creek is part of supreme law, and cannot be altered by act of Congress, which cannot obliterate jurisdiction of Mississippi over citizens. U.S.C.A.Const. art. 6, cl. 2.

4. Indians (Key) 5

Definition of term "Indian" appearing in one section of 1934 Act in no way altered or amended description of those entitled to organize under terms of another section. Act June 18, 1934, §§ 1 et seq., 16-19, 48 Stat. 984.

See publication Words and Phrases for other judicial constructions and definitions.

5. Indians (Key) 10

Purpose of 1934 Act concerning nonallotment of land of Indian reservation to individual Indians was to legislate for Indian tribes, not for individual Indian, and to give tribes some independence from Bureau of Indian Affairs. Act June 18, 1934, §§ 7, 16, 48 Stat. 984.

6. Indians (Key) 2

Congress has not conferred authority upon Secretary of Interior to create Indian tribes where none has existed. Act June 18, 1934, §§ 7, 16, 48 Stat. 984.

7. Indians (Key) 3

Nothing in various Congressional enactments indicates desire or purpose to abrogate Dancing Rabbit Treaty. U.S.C.A.Const. art. 1, § 8, cl. 17; art. 6, cl. 2; Act May 25, 1918, § 9, 40 Stat. 561; Act June 18, 1934, §§ 1 et seq., 7, 16-19, 48 Stat. 984; Act June 21, 1939, 53 Stat. 851.

8. Indians (Key) 27(2)

Congress has not indicated any desire or purpose to oust Mississippi of its jurisdiction over Choctaw Indians, who have been its citizens, as declared by Treaty, for over 100 years, and jurisdiction of State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired. U.S.C.A.Const. art. 1, § 8, cl. 17; art. 6, cl. 2; Act May 25, 1918, § 9, 40 Stat. 561; Act June 18, 1934, §§ 1 et seq., 7, 16-19, 48 Stat. 984; Act June 21, 1939, 53 Stat. 851.

James Holmes Haddock, Carl F. Andre, A. F. Summer, Atty. Gen. of Miss., Jackson, Miss., for defendants-appellants.

S. Bobo Dean, Washington, D. C., for Miccosukee tribe of Indians of Florida.

Robert E. Hauberg, U. S. Atty., James B. Tucker, Asst. U. S. Atty., Jackson, Miss., Wallace H. Johnson, Asst. Atty. Gen., Larry G. Gutterridge, Jacques B. Gelin, Lands Div., Dept. of Justice, Washington, D. C., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING

(Opinion Dec. 13, 1974, 5 Cir. 1974, 505 F.2d 633)

Before COLEMAN, CLARK and RONEY, Circuit Judges.

COLEMAN, Circuit Judge.

Our original opinion in this case is reported, 505 F.2d 633 (5 Cir. 1974).

Since the rendition of that opinion, the Supreme Court of Mississippi, in the context of a criminal case, has had occasion to pass on the issue of whether the State has been deprived of jurisdiction over criminal offenses committed by Indians on the Choctaw Indian Reservation. In an exhaustive, scholarly opinion, it was held that Mississippi retains such jurisdiction. *Tubby v. State*, 327 So.2d 272 (Miss., 1976).

There are two decisive factors in this case.

I

The Chata Development Company

In the prior opinion we held that Chata, a Mississippi corporation, chartered in compliance with Mississippi law, is an entity separate and apart from the Mississippi Band of Choctaw Indians; that in this suit the United States is attempting to lend its name to a suit on behalf of a private corporation and thus was not a real party in interest.

We adhere to that view.

Chata was a building contractor, no more and no less. It had a contract to build houses for the Choctaw Housing Authority. Unless the Authority was contracting with itself, which would have been a barefaced subterfuge, then Chata's separate identity, capacity, and existence cannot be doubted, as a matter of either law or fact.

II

The Status of the Mississippi Choctaw Indians

[1] After the ratification of the Treaty of Dancing Rabbit Creek the Choctaw Indians who chose to remain in Mississippi were no longer an Indian Tribe, they were citizens of Mississippi, and they most assuredly were not wards of the United States. The only way they could reassume Choctaw tribal citizenship was to move to the Indian Territory.

As cited in the original opinion, a thorough discussion of this situation was authored by Mr. Justice Pitney in *Winton v. Amos*, 255 U.S. 373, 41 S.Ct. 342, 344, 65 L.Ed. 684 (1921). That opinion of the Supreme Court sets forth in interesting detail the many *unsuccessful* efforts of the Mississippi Choctaws to reassume Choctaw citizenship without moving to the Indian Territory. See, also, *Choctaw Nation v. United States*, 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306 (1886).

The opinion in *Amos* was grounded on Article XIV of the Dancing Rabbit Treaty:

> "Each Choctaw head of a family desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, (etc)."

This was an important concession. Unlike the later mistreatment of the Cherokees, no Choctaw had to remove himself to the Indian Territory unless he wished to do so. It was not a surprising arrangement, because the Choctaws had always lived in harmony with the white man. Their proud boast was that, unlike the nearby Chickasaws and Creeks, they had never raised their hands in war against the white man. Great chiefs, like Pushmataha, had rejected the blandishments of Tecumseh in the War of 1812 and had sent him out of the Nation into the hands of the more hospitable Creeks, the result of which, at the hands of Andrew Jackson, is well known. Moreover, the Choctaws were not nomadic. They lived in fixed habitations, cultivating corn and other crops. Thus they were identified as one of the five civilized tribes.

[2] In any event, this Treaty was made by and between the Tribe and the United States and both were bound by its terms. By remaining and accepting (or claiming later, as some did) the lands allotted to those who wished to stay, the individual Indian likewise bound himself to the provisions of the Treaty.

[3] The Treaty of Dancing Rabbit is a part of the Supreme Law, United States Constitution, Article 6, Clause 2, and it cannot be altered by an Act of Congress; Congress cannot obliterate the jurisdiction of Mississippi over its citizens.

This case simply does not fit into the extensive jurisprudential grooves developed with reference to Indian wards or those Indian Reservations which were established either by Treaty or created by Congress for those who never converted their Indian status to that of state citizenship.

The Leech Lake Reservation, the subject of the Supreme Court opinion in *Bryan v. Itasca County, Minnesota* [1976] ..... U.S. ....., 96 S.Ct. 2102, 48 L.Ed.2d 710 was established by a Treaty, and Bryan was a duly enrolled member of the Chippewa tribe.

The Choctaw Indians of Mississippi do not live in Indian country. Except for that land patented to individual Indians under the terms of the Treaty (and not in trust) the Tribe sold all of its land to the United States in 1830. By 1850 virtually every acre of it had been patented to private purchasers by virtue of sales at the Land Offices in Columbus and Paulding. See, *DeCoteau v. District County Court for Tenth Judicial District*, 1975, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300. See also, *Dillon v. Antler Land Company of Wyola*, 9 Cir., 1974, 507 F.2d 940, *cert. denied*, 421 U.S. 992, 95 S.Ct. 1998, 44 L.Ed.2d 482.

In its original brief the Department of Justice asserted:

> "The Mississippi Band's reservation, held in trust for the Indians by the United States, is not under the jurisdiction of the State of Mississippi and is not subject to state tax."

We considered this to be so palpably erroneous that we proceeded in our original opinion to demonstrate our disagreement.

We must confess some bafflement with the wiggling positions taken by the government at various periods of this appeal.

In its original brief the government asserted, as above quoted, that the Mississippi Band's reservation "is not under the jurisdiction of the State of Mississippi".

In a motion to amend the opinion, filed January 28, 1975, the government argued, although it had raised the point in the first place, that it was not necessary to a decision of the case.

In the petition for rehearing, now under consideration, the government argues:

> "Before leaving McGowan [*United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410] we want to clear up a misconception which, we believe, was created by our pleadings and brief. An Indian reservation is never an area of exclusive federal jurisdiction either in a practical sense or under Article I, Section 8, Clause 17 of the Constitution. Compare the opinion of the Court, 505 F.2d 633 at 641 note 2 and 643. Within an Indian reservation tribal jurisdiction and federal jurisdiction largely pre-empt state jurisdiction as to matters affecting the Tribe and its members, but state jurisdiction controls matters exclusively concerning non-Indians. For instance, a crime committed by a non-Indian against another non-Indian in Indian country is tried in state court and under state law. As a corollary state law enforcement officers have free access within Indian reservations. This is not so as to areas of exclusive federal jurisdiction. See, e. g., *New York ex rel. Ray v. Martin*, 326 U.S. 496 [66 S.Ct. 307, 90 L.Ed. 261] (1946); *Draper v. United States*, 164 U.S. 240 [17 S.Ct. 107, 41 L.Ed. 419] (1896). See also *McClanahan v. Arizona State Tax Commission* [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129]. Consequently the provisions of Article I, Section 8, Clause 17 of the Constitution and the holding in *Paul v. United States*, 371 U.S. 245 [83 S.Ct. 426, 9 L.Ed.2d 292] (1963), requiring formal state consent to establishing an area of exclusive federal jurisdiction, are inapplicable to

> the establishment of an Indian reservation. See *United States v. McGowan, supra*, 302 U.S. at 539 [58 S.Ct. 286]."

The government argues that by reason of certain Congressional enactments beginning with May 25, 1918, eighty eight years after the Treaty, the State has lost its jurisdiction over its Choctaw Indian citizens.

An examination of the various Congressional enactments since 1918 has been a matter of considerable interest. A brief synopsis of the Legislative history of these Acts will be set forth in the Appendix to this opinion.

We take first the Act of May 25, 1918, 40 Stat. 561. This was an appropriation bill. It referred to the "full-blood Choctaw Indians of Mississippi" and to "the relief of [their] distress". The entire statute [40 Stat. at 573] reads as follows:

MISSISSIPPI

> Sec. 9. For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000; for their education by establishing and maintaining day schools including the purchase of land and the construction of necessary buildings, $20,000; for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, to be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States, under such rules and regulations as he may direct, $25,000; for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton, and other crops, $25,000,

which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five; in all, $75,000, to be immediately available.

The Act does not refer to the Indians as a tribe, it does not mention an Indian Reservation, and it offered no help to those of less than the full blood. It was what it declared itself to be, a relief act, limited to individual Choctaws of the full blood. It required that one-third of the appropriation be repaid as directed by the Secretary of the Interior and that another one-third should be repaid by June 30, 1925. Obviously, Congress did not consider the Mississippi Choctaws as wards of the government.

It is hardly a matter of surprise, burdened like their white brethren with a hazardous one crop (cotton) economy and discriminatory freight rates which stifled industrial development, that the Indians did not pay for the lands which had been sold them out of the $25,000 appropriated for that purpose. Congress found it advisable to legislate again. It passed the Act of June 21, 1939 [53 Stat. 851]:

AN ACT

To define the status of certain lands purchased for the Choctaw Indians, Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title to all lands purchased by the United States for the benefit of the Choctaw Indians

of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat.L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Approved, June 21, 1939.

Title to the lands was "declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior". Only those individuals designated by the Secretary of the Interior were to have the benefit of this Act. Neither a tribe nor a reservation is mentioned.

This brings us to a consideration of the Act of June 18, 1934 [48 Stat. 984], upon which the government so strongly relies for the proposition that the State of Mississippi has been ousted of jurisdiction over its Indian citizens, the Treaty of Dancing Rabbit Creek to the contrary notwithstanding.

Shorn of extraneous provisions, this Act reads as follows:

That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Sec. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation

thereof are hereby extended and continued until otherwise directed by Congress.

* * *

Sec. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * *

Sec. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * *

Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the

same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Sec. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent

with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Sec. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Sec. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

Importantly enough, Congress expressly directed that Sections 16, 17, and 18 should not apply to the Choctaw Indian Tribe located in Oklahoma.

We again point to the specific language of Section 16: "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize * * *".

[4] We adhere to the view originally entertained that the definition of the term "Indian" appearing in Section 19 in no way altered or amended the description of those entitled to organize under the terms of Section 16.

We also adhere to the opinion that:

(1) The Choctaw Indians residing in Mississippi in 1934 were not members of an Indian tribe. The tribe was in Oklahoma. The tribal status of the Mississippi Choctaws had been permanently extinguished by the 1830 Treaty of Dancing Rabbit Creek;

[5, 6] (2) Granting that Section 7 of the 1934 Act authorized the Secretary of the Interior to set up new Indian reservations, we think that the clear intent of Congress was to legislate for Indian tribes, not for individual Indians;

(3) We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior to create Indian tribes where none had theretofore existed. Under Section 16 only a tribe could organize for self-government, etc. Additionally, we think the purpose was to give the tribes some independence from the Bureau of Indian Affairs;

[7] (4) Nothing in the various Congressional enactments indicates a desire or purpose to abrogate the Dancing Rabbit Treaty;

[8] (5) Nothing in the various Congressional enactments indicates a desire or purpose to oust Mississippi

of its jurisdiction over those who had been its citizens, so declared by Treaty, for over a hundred years.

Consequently, we are of the opinion that the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired.

As to the dealings between the Secretary of the Interior and the United States government, on the one hand, and the Mississippi Choctaws, on the other, we do not purport to pass on their validity *vis a vis* the participants.

The Petition for Rehearing is

DENIED.

APPENDIX

LEGISLATIVE HISTORY

I

ACT of May 25, 1918

The proposal as to the Choctaw Indians of Mississippi was originally lost in the House on a point of order. It came back to the House in a Conference Report on House and Senate versions of the Indian Appropriations Bill.

During the original debate in the House it was shown that Congress had appropriated funds for an investigation of the condition of the Mississippi Choctaws. The report of a member of the Board of Indian Commissioners, who had made the investigation, is printed at Page 1138, Volume 56, Part 2 of the Congressional Record, Sixty Fifth Congress, Second Session. In part, the Commissioner said:

> "The bulk of the Mississippi Choctaws live adjacent to the towns of Tucker, Stratton, and Union, in Neshoba and Newton Counties; in fact, practically one-half live in Neshoba County. A number live in

> Leake, Scott, Kemper, and Attala Counties, and there are families scattered over various other portions of the State.
>
> * * *
>
> "The Choctaws of Mississippi have a very good name as regards honesty, truthfulness, cleanliness, and general morality.
>
> * * *
>
> "I am not prepared to advocate a reservation for these people."

The Commissioner concluded by recommending the steps actually taken in the Act of May 25, 1918.

During the original debate in the House, Representative Ferris of Oklahoma, made the following remarks (Page 1140):

> "MR. FERRIS. Mr. Chairman, the gentleman from Mississippi [MR. VENABLE] has just offered an amendment providing for the creation and establishment of a small Government agency to preside over and serve as a protectorate over some 1,100 Choctaw Indians living in Mississippi. This presents a new phase of it; it deserves attention.
>
> "The Choctaw question is not a new one in this House. It has been debated and voted upon many times. In a word, the contention of the Mississippi delegation has always been in the past that they were entitled to share in the funds of the Oklahoma Indians, although they refused to move west and take up residence with them, and still so refuse.
>
> "I have always opposed the adoption of the latter course and oppose it today. No one, either in law, equity, or good morals, I think, can justly advocate such a course.

"More than 90 years ago the Choctaw Tribe of Indians resided in the State of Mississippi. They then owned approximately 15,000,000 acres of land in Mississippi.

"By the treaty of 1820 they traded 4,000,000 acres of that land for what now comprises the Choctaw and Chickasaw Nation in the State of Oklahoma, an area in the treaty described by metes and bounds which, originally comprised what was then the Indian Territory, now a part of Oklahoma. The treaty contained a provision which provided for the removal of the Choctaws from the State of Mississippi west, leaving 10,000,000 acres of their land behind in Mississippi.

"Ten years later, in 1830, an additional treaty was entered into between the Choctaw Indians and the Federal Government, which treaty intended to more effectually carry out the provisions of the treaty of 1820, and which contains the fourteenth article, which has always been the bone of contention, and is and can be the only basis of the pretended claims of these Mississippi Indians to share in the estate of the Indians that moved west.

"The total number of Choctaws in 1830 was 18,200. Of these, 15,000 removed as per the terms of the treaty, and approximately 4,000 of them remained behind in Mississippi, refusing to abide by the treaty. These 4,000 Indians that remained in Mississippi from 1830 to 1842 had the right to take up residence and be allotted land on the 10,000,000 acres in Mississippi, and, as fast as they could be identified, were allotted and given allotments from this land.

"Only 143 families were induced to take lands from the 10,000,000 acres in Mississippi, while 3,885 for some cause refused to take allotments during the 12-year period. These 3,885 Indians who had refused to accept allotments were by the Federal Government later given land scrip to the amount of 640 acres for each and every head of the family, 320 acres for every child from 10 years of age, and 160 acres for every child under 10 years of age, one half to be delivered to them in Mississippi by the Federal Government and the other half after they removed from Mississippi to the then Indian Territory.

"The records of the Indian Office show conclusively, without any question of doubt, that this scrip was actually delivered to them and that they actually received the benefits under it.

"It can be had by consulting House Document 898, Sixty-second Congress, second session.

"The last half, or remainder, of the scrip was capitalized at $1.25 per acre and paid to these Choctaw Indians in person by the Indian agent for the Federal Government. (See muster rolls of the Indian Office and vouchers, which show precisely that the Indians first received the land and, second, the money.) The total amount of money paid to the Indians was $872,000, which was in lieu of the last half of the scrip, which they had up to that time been unwilling to accept.

"Thus it will be observed that these Indians have received more land and more money than the Indians who obeyed the treaties, removed west, and suffered the hardships and outrages committed by the wild western tribes of Indians who then lived upon the prairies.

"In addition to this, four Secretaries of the Interior have held that they had no rights to the Indian estate in Oklahoma and that they had had their patrimony, had disposed of it, and were without any claim whatever upon the Oklahoma Indians. Four Secretaries of the Interior shared this view. The Dawes Commission shared this view. The Federal courts in the Jack Amos case adopted this view. This House has four times passed on the matter by an affirmative vote, and each time denied that they had any rights. Both House and Senate Indian Committees have repeatedly passed on it, and always held they had no rights.

"If there ever was a case of res adjudicata, this is one of them, and I assume that the Mississippi delegation have at last adopted the correct theory. However, in the face of all this, it is true that there are some 1,100 dependent Indians in the State of Mississippi without homes, without education, without employment, and without proper attention. To me there can be no great wrong in having the Federal Government, not as a matter of right but as a matter of charity, establish this agency, adopt the gentleman's amendment, and do for these dependent, helpless Indians what we are doing for other tribes in a similar condition in other States.

"There will be good men who will disagree with me about this proposition, both in and out of the Congress of the United States, both on and off the Indian Committee, but for me and mine I have always felt that the Federal Government should not allow the original occupant of the land—I mean the American soil—to go in want, his own improvidence notwithstanding."

When the Conference Report came before the House (Page 6686) Mr. Carter of Oklahoma, said:

"What do we propose to do here with reference to the Mississippi Choctaws?

"Gentlemen have said that in the past I have opposed the Mississippi Choctaw amendment. I have opposed the Mississippi Choctaws taking any part of the funds of the Choctaws in Olahoma, because the courts, the commissions, three Secretaries of the Interior, and two Presidents had decided that they had no equitable interest in those funds. I have no apology whatever for my action with reference to this matter; and if the question ever arises again I hope I may be here on the job to prevent any such injustice and outrage being done the Choctaws in Oklahoma. What I have said with reference to the Mississippi Choctaw connection with the Federal Government is set forth in the records of this House. I quote from the report which I had the honor to assist in making as a member of a committee considering this question several years ago, as follows:

"The Federal Government, as such, is neither legally nor equitably obligated to enroll Mississippi Choctaws with the Choctaws west, and is under only such moral obligation to the Mississippi Choctaws as is due to dependent North American Indians who were originally occupants and owners of the soil, and who have been deprived of their patrimony by white settlers.

"I have no apology to make for that statement, but the gentleman from Iowa [MR. GOOD] says this $75,000 item constitutes a claim against the Federal Government. The difficulty with the gentleman is that he is unable to distinguish between a claim and a gratuity."

II

The Act of June 21, 1939 passed the House and the Senate without comment or debate.

III

Chairman Wheeler of the Senate explained the purpose of the Act of June 18, 1934 (Congressional Record, Seventy Third Congress, Second Session, Volume 78, Page 11,123), as follows:

> "The third purpose of the bill is to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
>
> "This provision will apply only if a majority of the Indians on any Indian reservation desire this sort of organization. As a matter of fact, however, it does not change to any great extent the present tribal organization, except that when a majority of the Indians want to establish this tribal organization and extend the provisions of the bill to it, they may do so."

In the House, Mr. Howard, in charge of the bill, stated (Page 11,732):

> "For the purposes of this act, section 21 defines the persons who shall be classed as Indians. In essence, it recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth or more Indian blood. The latter provision is intended to prevent persons of less than one-fourth Indian blood who are not already enrolled members of a tribe or descendants of such members living on a reservation from claiming the financial and

> other benefits of the act. Obviously the line must be drawn somewhere or the Government would take on impossible financial burdens in extending wardship over persons with a minor fraction of Indian blood.
>
> • • •
>
> "MR. DICKSTEIN. There have been quite a number of protests from my State in which it is stated that this bill will more or less compel them to go into the amalgamation whether they want to do so or not. Does the bill do this?
>
> "MR. HOWARD. Under this bill no tribe of American Indians will be forced to come under its provisions unless a majority of that tribe shall by vote request to do so."

UNITED STATES of America et al.,
Plaintiffs-Appellees,

v.

STATE TAX COMMISSION OF the
STATE OF MISSISSIPPI et al.,
Defendants-Appellants.

No. 73-3034.

United States Court of Appeals,
Fifth Circuit.

Oct. 27, 1976.

United States brought suit on behalf of Mississippi Band of Choctaw Indians to enjoin the Mississippi State Tax Commission from assessing, collecting, and attempting to collect sales taxes from construction company formed at request of tribal council. The United States District Court for the Southern District of Mississippi, at Jackson, William Harold Cox, J., granted permanent injunction and the Commission and the sheriff appealed. The Court of Appeals, Coleman, Circuit Judge, 505 F.2d 633, reversed and remanded. On petition for rehearing, the Court of Appeals, Coleman, Circuit Judge, 535 F.2d 300, denied the petition. On petition for rehearing and petition for rehearing en banc, the Court of Appeals held that the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired.

Petition for rehearing en banc denied.

1. Indians (Key) 3

Act of Congress may supersede treaties with Indian tribes with respect to disputes between the Government and Indian tribes which are wards of the nation, communities dependent on the United States, owe no allegiance to the states and receive from them no protection.

2. Indians (Key) 3

The 1831 treaty of Dancing Rabbit Creek between the United States and Choctaw Indians may not be superseded by implication.

3. Indians (Key) 7

Congress has plenary power to legislate with reference to Indians, including right to appropriate funds for their benefit as gratuities or otherwise.

4. Indians (Key) 3

Under 1831 Treaty of Dancing Rabbit Creek between the United States and Choctaw Indians, jurisdiction of State of Mississippi over citizens of Choctaw Indian tribe who chose to remain in Mississippi stands unimpaired.

James Holmes Haddock, Carl F. Andre, A. F. Summer, Atty. Gen. of Miss., Jackson, Miss., for defendants-appellants.

S. Bobo Dean, Washington, D. C., for Miccosukee tribe of Indians of Florida.

Robert E. Hauberg, U. S. Atty., James B. Tucker, Asst. U. S. Atty., Jackson, Miss., Wallace H. Johnson, Asst. Atty. Gen., Lands Div., Larry G. Gutterridge, Jacques B. Gelin, Dept. of Justice, Washington, D. C., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC.

Before COLEMAN, CLARK and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

We wish to comment on one facet of the petition for rehearing en banc.

The order denying the original petition for rehearing, 535 F.2d at 302, stated:

> "The Treaty of Dancing Rabbit is a part of the Supreme Law, United States Constitution, Article 6, Clause 2, and it cannot be altered by an Act of Congress; Congress cannot obliterate the jurisdiction of Mississippi over its citizens."

Concentrating on the first portion of this sentence, and ignoring the second, the petition for rehearing says, "In fact, case after case has held exactly the opposite."

[1] It is certainly true that on a number of occasions the Supreme Court has held that an Act of Congress may supersede treaties with *Indian tribes*. It was so held in *The Cherokee Tobacco*, 11 Wall. (78 U.S.) 616, 621, 20 L.Ed. 227 (1870); *Ward v. Race Horse*, 163 U.S. 504, 511, 16 S.Ct. 1076, 41 L.Ed. 244 (1896); *Draper v. United States*, 164 U.S. 240, 243, 17 S.Ct. 107, 41 L.Ed. 419 (1896); *Thomas v. Gay*, 169 U.S. 264, 271, 18 S.Ct. 340, 42 L.Ed. 740 (1898); *Lone Wolfe v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903) and *Ex Parte Webb*, 225 U.S. 663, 32 S.Ct. 769, 56 L.Ed. 1248 (1912). These cases, of course, were concerned with disputes between the government and Indian tribes, wards of the Nation, communities dependent on the United States, *owing no allegiance to the States* (emphasis added) and receiving from them no protection, *Lone Wolfe v. Hitchcock, supra*, 187 U.S. at 567, 23 S.Ct. [216] at 222 (quoting *United States v. Kagama*, 1885, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228).

However, the *Hitchcock* Court was careful to note the provisions of the Act of March 3, 1871, which put an end to the practice of making treaties with Indian tribes. That Act specified that

> "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The *Hitchcock* opinion continued:

> "That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation v. United States*, 119 U.S. 1, 27 [7 S.Ct. 75, 30 L.Ed. 306] and *Stephens v. Cherokee Nation*, 174 U.S. 445, 483 [19 S.Ct. 722, 43 L.Ed. 1041]."

When Congress, in 1871, reaffirmed the validity of all prior Indian treaties, the Treaty of Dancing Rabbit had been on the books for forty years, and for nearly that long the Choctaw Indian Tribe had been removed to the Indian Territory. Those of Choctaw blood who chose to remain in Mississippi as citizens had for that long been emancipated from the control and protection of the United States, subject to all the obligations of state citizenship. As noted in our prior opinions in this case, the United States government took no notice of the Mississippi Choctaws until 1918, when, as a "gratuity", it extended financial relief, most of which was to have been repaid.

[2] Leaving aside the factor of intervening state sovereignty over its citizens in matters left to the states under our federal system, the lengthy list of cases cited *supra* make it clear that the Dancing Rabbit Treaty may not be superseded by implication—see, particularly, *Ward v. Race Horse*, 163 U.S. at 511, 16 S.Ct. 1076.

The dispositive point is that throughout a period of 145 years the Congress has never passed an act specifying a purpose to supersede the Treaty of Dancing Rabbit or declaring that the State of Mississippi shall be deprived of the jurisdiction appropriately belonging to it. To the contrary, as pointed out in our previous opinions, especially in the legislative history appearing at 535 F.2d 306, Congress has repeatedly declined earnest solicitations that it take such action with reference to the Mississippi Choctaws.

[3] The plenary power of Congress to legislate with reference to Indians, including its right to appropriate funds for their benefit, as gratuities or otherwise, is not disputed. In the preceding opinion, 535 F.2d 306, we have stated that "As to the dealings between the Secretary of the Interior and the United States government, on the one hand, and the Mississippi Choctaws, on the other, we do not purport to pass on their validity *vis a vis* the participants", 535 F.2d 306.

[4] What we hold, and all that we hold, is that "the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired."

Quoting the Supreme Court, "we cannot remake history", *DeCoteau v. District County Court for Tenth Judicial District*, 1975, 420 U.S. 425, 95 S.Ct. 1082, 1095, 43 L.Ed.2d 300.

The petition for rehearing en banc is DENIED.